Docket for 02-8286

No. 02-8286 Status: GRANTED
Title: Delma Banks, Jr., Petitioner
v.
Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed: January 6, 2003
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (01-40058)
Decision Date: August 20, 2002
Rehearing Denied: September 23, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 23 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 5, 2003)
Jan 28 2003	Order extending time to file response to petition to and including February 19, 2003.
Feb 19 2003	Brief amicus curiae of John J. Gibbons, et al. filed.
Feb 19 2003	Brief of respondent Cockrell, Dir., TX DCJ filed.
Feb 27 2003	Brief of petitioner Delma Banks filed.
Feb 27 2003	Application (02A724) for a stay of execution, submitted to Justice Scalia.
Mar 12 2003	Application (02A724) referred to the Court by Justice Scalia.
Mar 12 2003	Application (02A724) granted by the Court.
Apr 21 2003	Petition GRANTED. limited to Questions 1, 2, and 3 presented by the petition.
May 1 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 3, 2003.
May 5 2003	Record received. Record proceedings from the U.S. Court of Appeals for the Fifth Circuit (1 box)
Jun 25 2003	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 11, 2003.
Jul 9 2003	Joint appendix filed
Jul 11 2003	Brief amicus curiae of American Bar Association filed.
Jul 11 2003	Brief amici curiae of William G. Broaddus, et al. filed.
Jul 11 2003	Brief amici curiae of John J. Gibbons, et al. filed.
Jul 11 2003	Brief of petitioner Delma Banks, Jr. filed
Aug 4 2003	Extension of time within which to file respondent's brief on the merits to and including September 9, 2003.
Sep 16 2003	Further extension of time within which to file respondent's brief on the merits to and including September 26, 2003.
Sep 18 2003	Further extension of time within which to file respondent's brief on the merits to and including October 3, 2003.
Sep 24 2003	SET FOR ARGUMENT Monday, December 8, 2003
Oct 1 2003	Brief of respondent Cockrell, Dir., TX DCJ in opposition filed.
Oct 2 2003	Record received from the U.S.D.C. for the Eastern (Texarkana) Dist. of Texas. box (part of the record is sealed)
Oct 23 2003	Joint lodging material received from counsel and distributed.

Docket for 02-8286

Oct 24 2003 CIRCULATED.
Nov 5 2003 Reply of petitioner Delma Banks filed. (Circulated)

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-8286

Supreme Court, U.S.
FILED
DEC 23 2002
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DELMA BANKS, Jr.,
Petitioner,

-vs-

JANIE COCKRELL, Director,
Respondent.

ORIGINAL

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

An Execution Date Is Set For March 12, 2003

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CAPITAL CASE

QUESTIONS PRESENTED

In this Texas capital case, the Fifth Circuit (in an unpublished order) overturned the district court's issuance of *habeas corpus* relief as to Petitioner Delma Banks's sentence. Banks contends that the Court of Appeals reached this result only by misapplying and misinterpreting well-established precedents of this Court regarding, *inter alia*, prosecutorial suppression of material evidence favorable to a defendant, prosecutorial misuse of peremptory challenges to exclude African Americans from Banks' petit jury, and trial counsel's ineffective assistance of counsel. Specifically, Banks seeks review by this Court of the following questions:

1. Did the Fifth Circuit commit legal error in rejecting Banks' *Brady* claim — that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial — on the grounds that:

(a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that, like in *Strickler v. Greene*, 527 U.S. 263 (1999), there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during the trial or state post-conviction proceedings; and

(b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate?

2. Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?

3. Did the Fifth Circuit act contrary to *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 507 U.S. 680 (1993) in holding that Fed. R. Civ. P. 15(b) does not apply to *habeas* proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

4. Did the Fifth Circuit err in refusing to consider Banks' jury discrimination claim — virtually identical to one this Court is considering in *Miller-El v. Cockrell* (No. 01-7662) — based upon its conclusions that:

(a) the state courts' rejection of that claim rested upon an adequate and independent state ground; and that

(b) there was inadequate prejudice to Mr. Banks's interests to excuse his counsel's failing to present, at trial, direct and statistical evidence of the prosecution's consistent policy of using peremptory challenges to keep African Americans off felony juries?

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IN THE SUPREME COURT OF THE UNITED STATES

No. ____

DELMA BANKS, Jr.,
Petitioner,
-vs-

JANIE COCKRELL, Director,
Re pondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Delma Banks Jr., respectfully requests that this Court issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, issued on August 20, 2002, is unpublished and is attached as App. A. The unreported decision of the United States District Court, issued on August 18, 2000, is attached as App. B. The report and recommendation of the Magistrate Judge, also unpublished, issued on May 11, 2000, is attached as App. C. The unreported decision of the Texas Court of Criminal Appeals, issued on January10, 1996, is attached as App. D. The unreported Findings of Fact and Conclusions of Law entered on July 22, 1993 by the 102nd Judicial District Court, Bowie County, are attached as App. E. The unreported Order of the Texas Court of Criminal Appeals, entered on March 3, 1993, is attached

as App. F. The unpublished Findings of Fact and Conclusions of Law, entered on February 22, 1993 by the 102nd Judicial District Court, Bowie County, are attached as App. G. The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing on September 23, 2002, is attached as App. H. The October 2, 2002 Order of the 102nd Judicial District Court, Bowie County, setting Mr. Banks' execution for March 12, 2003 is attached as App. I.

JURISDICTION

The Court of Appeals' judgment was entered on August 20, 2002. A timely petition for rehearing was denied on September 23, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the provision of the federal habeas statute concerning issuance of certificates of appealability. Those provisions are supplied in App. J.

STATEMENT OF THE CASE

1. State Trial Court Proceedings

On Monday, April 14, 1980, the body of sixteen-year-old Richard Whitehead was found in a Nash, Texas park at roughly 10:00 a.m. Tr. Ex. C-2 at 1. An initial investigation established that the last time he had been seen alive was the previous Friday evening, April 11. *Id.* at 2. Two female acquaintances of Whitehead told police he had been with a 21- year old African American male, later identified as Delma Banks, Jr. An individual near the park reported that he was awakened by loud noises that could have been gunshots at roughly 4:00 a.m. on Saturday, April 12. *Id.* at 5.

Police surveillance of Banks during the next week yielded no incriminating evidence. *Id.* at 6. Deputy Sheriff Huff, the lead investigator, thereafter contacted police informant Robert Farr and told him he would pay him $200 if Farr could obtain Banks' gun. Tr. at 87-89; Tr. Ex. B-01 at ¶ 7. Farr agreed and told Banks he needed a pistol to commit robberies. Farr persisted in the face of Banks' refusal until Banks finally agreed. Tr. Ex. B-01 at ¶ 8. Banks said they would have to go to Dallas to get a gun. *Id.* On April 23, Farr, Banks and Marcus Jefferson drove to Dallas after Farr tipped off police about the trip. *Id.* at ¶¶ 9-10; Tr. Ex. C-2 at 6. Bowie and Dallas County authorities monitored the trip, observed the car stop at a south Dallas home, and witnessed Banks go to the front door. Tr. Ex. C-2 at 6. After a short time, Banks returned to the car and drove away. *Id.* Within minutes, officers stopped the car. Tr. Ex. B-01 at ¶ 10. All three men were taken into custody and a .22 caliber pistol was seized. Tr. Ex. C-2 at 7. The next morning, Farr and Jefferson were released.

Deputy Huff immediately recognized that the seized .22 was not the murder weapon. *Id.* Before dawn, he and other officers returned to the south Dallas home, entered and confronted the occupant, Charles Cook. Tr. Ex. C-2 at 7. They spoke to Cook for forty-five minutes, informed him that Banks was wanted for Whitehead's murder and strongly suggested he cooperate. This encounter thoroughly frightened Cook, who was on probation. Tr. at 91. Later, police drove Cook to police headquarters where he provided a statement in which he asserted: (1) Banks had stayed with him on the weekend of April 12 and was driving a car that looked like Whitehead's Mustang; (2) during the course of the weekend Banks said he had killed a white boy; (3) Banks left the car and a .25 caliber pistol with Cook to discard; (4) Cook later abandoned the car in west Dallas and sold the gun to a neighbor. Tr. 142, Tr. Ex. B-02 at 1, 3. Cook was then transported

back to his home and was directed by police to go to the neighbor's house and retrieve the .25 caliber pistol. Tr. Ex. B-03 at 1. Cook did so. Officer Huff seized the pistol and submitted it for forensic testing. Tr. Ex. C-2 at 7.

On April 24, Banks was transported back to Bowie County. *Id.* He made no statements to police except to protest his innocence. The following day, he was formally charged with Whitehead's murder. Tr. Ex. C-2 at 8. Within days, Banks' parents retained Lynn Cooksey, a former District Attorney, to represent their son. Tr. at 210-11.

Prior to trial, the Bowie County District Attorney's office wrote to counsel to advise that there would be no need to litigate discovery issues. The letter stated unequivocally that "we will, without necessity of motions, provide your office with all the discovery to which you are entitled." 1SR at 13.

On August 15, 1980, Mr. Cooksey filed several standard pretrial motions, including one seeking discovery, 1SR at 17-28, but did not seek a hearing date on a single motion prior to trial. On the first day of jury selection, he commented repeatedly on his lack of preparation. He told the judge, "I'm not in possession of any information on any of the State's witnesses." 1SR at 99. Even though it had been provided to him a week earlier, Cooksey had not even read the State's witness list. At this hearing, he had to request another copy. *Id.* at 103. After jury selection and just prior to the trial's commencement, he again complained that the State had not turned over information about witnesses' prior convictions. He said "I don't have it yet and I cannot effectively cross-examine these people without it." 7SR at 1901. Even after the trial began, he announced that he had "never been to the [crime scene]," nor viewed certain crime scene

photographs. *Id.* at 2003-2005. Moreover, he later reported that he had "not seen the ballistics report." *Id.* at 2031.

Jury selection consumed several days. Near its end, Mr. Banks passed a note to Mr. Cooksey that stated "we need[] black[s]." Pet. RE Tab J. Cooksey wrote in reply, "State will strike all blacks."[1] *Id.* The prosecution, as predicted, used four peremptory strikes to remove all African Americans from the qualified pool. Cooksey made no objection to these strikes and an all-white jury was seated.

At trial, Patricia Hicks and Patricia Bungardt identified Mr. Banks as the person with Mr. Whitehead on the evening of April 11. 9SR at 2150, 2154. Both reported no animosity between Mr. Banks and Mr. Whitehead. *See id.* at 2148.

Mike Fisher testified that he was awakened by two loud noises at roughly 4:00 a.m. on Saturday morning. *Id.* at 2158. Pathologist DiMaio testified that Whitehead died from three bullet wounds, *id.*, at 2390, but was not asked to opine on when Whitehead was shot.

Robert Farr testified that he accompanied Mr. Banks to Dallas to secure a pistol. He also testified that after Mr. Banks made a brief stop at Charles Cook's house and returned to the car, Banks said that the .22 pistol he had just received from Cook was not his pistol; his was with a "broad in West Dallas." *Id.* at 2254-61, 2267-69. While Farr admitted that he was a user of illegal drugs, he denied that he was a paid informant. *Id.* at 2274.

Charles Cook was the central witness during the guilt phase. He testified that Mr. Banks drove up in front of his Dallas home at roughly 8:30 a.m. on Saturday, April 12, in a green

[1] Cooksey was the former District Attorney of Bowie County and had left that office only twenty months prior to Mr. Banks' trial.

Mustang, and that during the next two days he heard Banks confess to killing a white man in Texarkana. *Id.* at 2285-97. He also testified that at Mr. Banks' direction, he sold a pistol Mr. Banks left with him and abandoned Banks' car. *Id.* at 2303-05. Cook told jurors that he had spoken to no one in preparation of his testimony. *Id.* at 2314. The prosecutors assured the jury that Mr. Cook's testimony was completely truthful. 10SR at 2450.[2]

Lastly, firearms examiner David Jones testified that the bullets recovered from Mr. Whitehead and the crime scene likely were fired from the .25 pistol retrieved from Bennie Lee Jones and submitted to the lab by Deputy Sheriff Huff. *Id.* at 2357-58.

The defense presented no evidence. Instead, it sought through cross-examination to show that neither Charles Cook nor Robert Farr were credible witnesses. The jury deliberated for several hours, and just after 11:00 p.m. on September 30, convicted Mr. Banks of capital murder. *Id.* at 2485.

The penalty phase convened the next morning. The state's case for the death penalty and its belief that Mr. Banks would likely commit acts of violence in the future rested entirely upon the testimony of two witnesses: Vetrano Jefferson and Robert Farr. Jefferson, Mr. Banks' common law brother- in- law, testified that an unprovoked Mr. Banks struck him with a pistol and threatened to kill him one week prior to the Whitehead killing. *Id.* at 2493-94. Farr returned to

[2] Three other family members and a neighbor were called to corroborate minor portions of Mr. Cook's blockbuster testimony. A sister, Carol Cook, confirmed that she met Mr. Banks that weekend, when he and Mr. Cook came to her home in a green Mustang. *Id.* at 2362-65. Mr. Cook's former wife, Ida Mae Martin, confirmed that she was with Mr. Cook when Mr. Banks appeared on that Saturday morning, that he stayed at their home during the weekend, and that she and Mr. Cook loaned Mr. Banks money for his bus ticket back to Texarkana. *Id.* 2338-42. Mr. Cook's grandfather, Bennie Whiteurs, testified that Mr. Banks stayed in the family's home that weekend. *Id.* 2358. Finally, neighbor Bennie Lee Jones confirmed that he purchased a .25 pistol and other items from Mr. Cook shortly after Mr. Banks left Dallas. *Id.* 2356-61.

the stand and testified that the reason Banks had driven to Dallas on the evening of his arrest was so that Banks could reclaim his gun and commit armed robberies. *Id.* at 2500-02. Farr also reported that Banks said the gun would allow him to take care of any trouble that might arise during a robbery. *Id.*

The defense called several hastily assembled acquaintances of Mr. Banks and his parents. Each testified briefly that Banks was a respectful, churchgoing young man. *Id.* at 2514-2531. Two additional witnesses were called to discredit Mr. Farr. James Kelley testified that he had recently driven Farr to a number of doctors' offices to fill phoney prescriptions, *id.* at 2540-50, and former Arkansas police officer Gary Owen testified that Farr had served as a paid informant in that state and was known as unreliable. *Id.* at 2557-58. Finally, Mr. Banks testified and maintained his innocence. He pointedly contested Farr's account that he, rather than Farr himself, wanted the gun to commit robberies, and assured jurors he would live peacefully in prison if given a life sentence. *Id.* at 2566-69.

In closing, the prosecution argued that the evidence showed clearly that Mr. Banks would be dangerous in the future and that the special issues had been proven. *Id.* at 2578-82. Even though Farr had denied he was a paid informant, the prosecutor assured jurors that "he has been open and honest with you in every way . . . ." 10R 2579. Moreover, the prosecutors told jurors that Farr's testimony was of "upmost importance" to their case. The defense argued briefly that the evidence was insufficient. *Id.* at 2590-95. The jury found the state's evidence established the special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.[3]

[3] On direct review, the Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982). This Court denied certiorari. *Banks v. Texas*, 464 U.S. 904 (1983).

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

This petition presents four issues, each of which were raised in post-conviction proceedings.

a. Suppression of Impeachment Evidence of Key Penalty Witness Farr

In a state habeas petition filed in January, 1992, Mr. Banks alleged that the State's failure to disclose at trial that Robert Farr was a paid informant and that his testimony had been misleading violated due process. While the State filed a detailed response to every other claim raised in the petition, it made no response to this issue. Mr. Banks was unable to locate Mr. Farr to submit an affidavit or proffer of evidence. Neither the trial court's recommendation of denial of relief nor the Court of Criminal Appeals' order denying the writ made reference to this claim. *See* App. E & D.

Mr. Banks again pleaded this claim in his federal petition filed below. Because the state courts had not conducted an evidentiary hearing on this claim, he moved the court for discovery and for an evidentiary hearing. In support of these requests, Mr. Banks stated that his representatives had finally tracked down Robert Farr in California and Farr revealed for the first time in a declaration that he had been a paid informant in this case *and* that his critical testimony concerning Banks' intent to commit robberies was false. 2R at 598, Ex. B. The Magistrate Judge granted a hearing on this issue.

Farr testified that he worked as an informant for various police agencies before, during and after Mr. Banks' arrest and prosecution.[4] These agencies included Texarkana law

[4] Farr's testimony was by declaration. At the time of the hearing, he resided in California. Prior to the hearing, Mr. Banks moved that he be permitted to depose Mr. Farr or submit his declaration in lieu of live testimony for two reasons: (1) Farr did not want to return to Texarkana because he feared for his life

enforcement agencies. *See* Tr. Ex. B-1 at 1. He was frequently paid for these services. *Id.* Law enforcement in Texarkana and elsewhere knew of his use of illegal drugs and practice of falsifying prescriptions to procure drugs. However, officers never arrested him for these activities. *Id.* Farr testified that he became involved in this case after Deputy Huff demanded help. *Id.* at 2. Farr testified that he believed that if he did not agree to assist, Huff would have arrested him on drug charges and seen to his prosecution. Farr made clear that he was paid for his services in this case and that his damaging testimony about Banks wanting a gun so that he (Banks) could commit additional violent crimes was false. Moreover, he said he was under the influence of drugs when Banks was arrested in Dallas.[5]

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given his prior services as a police informant and (2) he was in poor health. The Director did not insist that Mr. Farr be produced for cross-examination or seek to depose him.

[5] Farr's declaration states as follows:

> 7. . . . I told [Deputy Huff] that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.
>
> 8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.
>
> 9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow us. This was the third or fourth conversation I had with Willie.
>
> 10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove away from the house, our car was pulled over by the police on

Id. Farr further testified that he left Texarkana shortly after Banks' trial on the advice of his law enforcement handlers who feared for his life. Consistent with these concerns, Farr testified that he hid out and would *not* have spoken with representatives of Mr. Banks before he finally chose to do so in the fall of 1996 (after the completion of state post-conviction proceedings). *Id.*

Both prosecutor James Elliott and Deputy Huff testified that the prosecution utilized Farr as an informant in Bank's case. Tr. at 54, 86. Huff also testified that Farr was paid roughly $200 for his services. *Id.* at 88-89.

On May 11, 2000, the Magistrate Judge issued her report and recommended that the writ be granted on this claim. App. C at 44. The Magistrate Judge concluded that Mr. Banks' sentence was constitutionally tainted by the suppression of Farr's paid informant status. She found that the evidence showed that at trial, "[t]he state attempted to portray Farr's involvement with Banks as one of an innocent acquaintance," but that the record showed conclusively that he was a paid informant. Given the importance of his testimony to the state's case for a death sentence, she concluded Mr. Banks was entitled to relief.

> Farr was one of the only two witnesses called by the State during the punishment phase. He testified that he, along with Banks and Marcus Jefferson, traveled to Dallas to retrieve the gun so that Banks could commit several armed robberies.

> the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.
>
> 11. While I was in the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

> The clear purpose of this testimony was to persuade the jury that Banks posed a continuing danger to society. Farr's testimony was misleading and inaccurate. At no time did the State correct Farr's erroneous testimony or announce Farr's paid informant status. Moreover, the State placed great reliance on Farr's testimony during the penalty phase. Indeed, the prosecutor characterized Farr's punishment phase testimony as "of the utmost significance," because it helped establish that Banks posed a "danger to friends, and strangers alike."

App. C at 43-44. The district court accepted this recommendation. App. B at 6.

The Fifth Circuit panel reversed. It concluded that the evidence relied upon below was defaulted because Mr. Banks had exercised insufficient diligence in attempting to locate either Farr or Deputy Huff during state habeas proceedings. App. A at 17-23. The panel did not cite or refer to Mr. Banks' primary argument, based squarely upon *Strickler v. Greene*, 527 U.S. 263 (1999), that he was entitled to present this evidence below. *Id.* at 26-33. Alternatively, the panel held that the district court also erred in finding the evidence to be material. The panel's analysis did not consider, *inter alia*, the fact that the trial prosecutors told the jury that Farr's testimony was of "utmost importance" to their case.

b. **Ineffective Assistance of Counsel at Penalty Phase**

Mr. Banks alleged in the 1992 state habeas petition a multi-faceted claim, supported by proffered affidavits, that his attorney had failed to adequately prepare for and represent him at the penalty phase of trial. Through affidavits from his parents, he proffered that trial counsel had conducted virtually no pretrial preparation for the penalty phase. When the guilty verdict was returned at 11:00 p.m., trial counsel asked Mr. Banks' mother to make sure that ministers from the community were present the next morning to testify. She made phone calls into the early morning hours searching for witnesses. The proffer confirmed what the trial transcript suggested strongly – that trial counsel never spoke to any of the witnesses who offered brief testimony, nor

conducted any prior investigation to learn of evidence that would show that Mr. Banks would not be a danger in the future.

The proffered evidence, which was available at the time of trial, showed that Mr. Banks had an extremely difficult upbringing, yet had no prior convictions. Mr. Banks' father was an alcoholic who would abuse and terrorize the family when he drank. On repeated occasions, Mr. Banks' father beat him and his mother, often forcing Mrs. Banks to flee the family home with her children for their safety. Even when his father was sober and remorseful, Mr. Banks could not have a normal relationship because his father worked at a chicken plant, and Mr. Banks was allergic to chickens. He was born allergic to many substances and often suffered from horrid rashes or hives. In the heat of Texas summers, he wore pants and long-sleeve shirts to hide his rash and hives and was the regular target of ridicule from peers.

The proffer also contained the expert opinion of psychologist Gregorio Pena. Dr. Pena found that Mr. Banks suffers from brain impairment that caused significant language and cognitive disabilities. He found that Mr. Banks had experienced numerous intense traumas during his childhood that were the direct result of his dysfunctional family, and that his father had beaten and terrorized him. He confirmed that Mr. Banks suffered from chronic bleeding skin and hives throughout his life and that these "largely untreated symptoms" led directly to disfigurement. Dr. Pena also found that given Mr. Banks' entire profile, he likely would be a nonviolent inmate in a highly structured environment such as prison.

The State presented affidavits from Cooksey and his investigator, Dennis Waters. Without making any factual determinations, the trial court recommended denial of the claim and simply declared that "counsel for Appellant at trial did give Appellant effective assistance of counsel

throughout all stages of the trial proceedings, including voir dire and pre-trial." App. G at 3. The Court of Criminal Appeals summarily accepted this recommendation and denied relief. App. D.

Mr. Banks raised the same claim in his federal habeas petition. Because the state court conducted no hearing and did not return any findings of fact on this claim, the Magistrate Judge granted an evidentiary hearing at which Mr. Banks presented several witnesses.

Mr. Banks' parents–Delma Banks, Sr., and Ellean Banks–testified that they hired Mr. Cooksey shortly after learning of their son's arrest. Cooksey sought a fee of $10,000, but they were able to pay him only $1,000. Tr. at 211. They also gave him some funds for the retention of investigator Waters. Prior to trial, they had only brief meetings with Cooksey and Waters that lasted "no longer than 10 to 15 minutes." *Id.* at 212. At none of these meetings did Cooksey or Waters ask for information about Delma, Jr.'s life that would be considered mitigating or show he was unlikely to be dangerous in the future. *Id.* at 224. At one point during the trial, Cooksey asked Mr. Banks, Sr. to meet with him, the judge and Delma, Jr., to discuss a plea offer that would have resulted in a life sentence in exchange for a plea of guilty to murder. Mr. Banks, Sr. agreed to the meeting but resisted urging his son to accept the deal when his son protested his innocence. *Id.* at 215. Mrs. Banks reported that during the guilt phase of trial, Cooksey approached her and asked her to testify that Delma Jr., was home with her on Friday evening, April 11. *Id.* at 225. She refused to do so, and when she did, Cooksey "took me by the arms and shook me and he said that what kind of mother is you that will not tell a little white lie to save your son's life. I told him I couldn't lie." *Id.*

Mrs. Banks testified she was present when the jury announced its verdict of guilty. The verdict was reached late at night. When she heard it, Mrs. Banks blacked out. *Id.* at 226. While

she waited to be taken to a hospital, Cooksey asked her to get as many ministers as she could in the courtroom the next morning. *Id.* at 225. At the hospital, she insisted that she be released. She was discharged at about 1:00 a.m. Once home, she called ministers until 3:00 a.m. to assure witnesses would be present for her son. Several showed up for the penalty hearing.

Both Banks parents had testified briefly at the sentencing hearing. Each had been surprised, however, as neither had ever spoken to Cooksey about what information he wanted them to convey to the jury. *Id.* at 216-17; 227. At the federal hearing below, both provided detailed social history information about themselves and Mr. Banks that they did not have an opportunity to tell the sentencing jury, and which would have shown he was unlikely to be a danger in the future.

Mr. James Kelly also testified at the federal hearing. Tr. at 232. Prior to trial, he had never been contacted by the defense nor told he would likely be a witness. Even on the morning of the sentencing hearing, he had no idea he would be called as a witness. When deputies came to pick him up to bring him to court, he "was drunk." *Id.* at 233. In court, he spoke for the first time to Cooksey, but in that minute or two, he did not learn why he was being called. Kelly's trial testimony focused upon Robert Farr and Farr's use of bogus prescriptions to secure drugs.

Vetrano Jefferson, another State's trial witness, also testified below. At trial, he had testified that Mr. Banks was the aggressor in a fight they had shortly before Mr. Banks was arrested in this case. 10SR at 2493-94. At the federal hearing, Mr. Jefferson admitted that version was false and testified that he, not Mr. Banks, was the aggressor. "I was drunk that day . . . and I was threatening my sister and he defended her. . . ." Tr. at 166. When asked who started the fight, Mr. Jefferson stated "I did." *Id.* He also testified that he never spoke to Mr. Cooksey nor Mr.

Waters prior to trial and that he would have been willing to do so had they asked to speak with him about the incident. *Id.* at 168.

Mr. Banks also called Dr. Mark Cunningham, a forensic psychologist. Dr. Cunningham testified that he conducted a thorough psychological evaluation of Mr. Banks. Tr. 279. This evaluation revealed, as had Dr. Pena's, that Mr. Banks grew up in a violent home environment due almost entirely to his father's chronic alcohol problem and repeated acts of abusive behavior directed at Mr. Banks as well as the rest of the family. Tr. at 265-70. He found that Mr. Banks had chronic health problems and learning disabilities that prevented him from enjoying success in school. *Id.* at 272. He concluded that a detailed risk assessment of Mr. Banks at time of trial would have shown that there was little likelihood that Mr. Banks would commit additional acts of violence in the prison setting. *Id.* at 279-81.

Additional evidence was presented to establish that the State's theory of guilt was easily assailable had counsel made the effort. Two witnesses, State's trial witness Mike Fisher and Alabama medical examiner Dr. LeRoy Riddick, gave testimony to establish that one essential element of the State's case against Mr. Banks – that Mr. Whitehead was shot at roughly 4:00 a.m. on Saturday, April 12 -- was not true and could have been discredited had counsel conducted a minimally adequate investigation of the underlying facts.

At trial, the State's theory was that Mr. Banks was alone with Mr. Whitehead during the early morning hours of April 12 in the Nash park where Mr. Whitehead's body was found on April 14. According to this theory, Mr. Banks shot Mr. Whitehead three times at roughly 4:00 a.m., took Whitehead's car, then drove 180 miles to Dallas and arrived in front of Mr. Cook's

house by 8:15 or 8:30 a.m. The crucial timing of the murder was purely inferential and came solely from the testimony of Mike Fisher.

At trial, Mr. Fisher testified that he was asleep in a house that bordered upon the park in the early morning hours of April 12 and was awakened by two loud noises. He testified that his companion told him it was a few minutes after 4:00 a.m. He was unable to confirm the noises were, indeed, gunshots, but said they "sounded like gunshots." 9SR at 2159. On cross-examination, defense counsel asked only whether he heard two loud noises. *Id.* at 2160. The prosecution asked the jury to conclude that Mr. Fisher, at 4:00 a.m., heard two of the three shots that fatally wounded Mr. Whitehead. 9SR at 2444.

At the hearing below, Mr. Fisher supplemented his trial testimony with significant qualifying information. He testified that he recalled being awakened by loud noises coming from the park behind the house. Tr. at 203. He said, however, that he knows nothing about guns, and thus could not be certain that the noises he heard were gunshots. *Id.* He conceded that the noises could have been firecrackers or car backfire, or even rifle shots (as opposed to pistol shots). Moreover, the noises could have occurred as early as 3:00 a.m. and as late as 5:00 a.m. *Id.* at 204.

Dr. Riddick's testimony focused upon the time of death issue. Tr. at 183-88. He explained that several factors identified during the autopsy strongly suggested that Whitehead was shot not at 4:00 a.m. on April 12, but late in the evening on April 12 or early in the morning on April 13 (when Mr. Banks was in Dallas). *Id.* First, both Deputy Huff and Dr. DiMaio observed full rigor mortis in Whitehead's body. Rigor mortis usually appears very soon after death, renders the body stiff within 12 to 24 hours after death, and then wanes 36 hours after death. Huff observed Whitehead roughly 54 hours after Fisher heard the loud noises, and DiMaio roughly 78 hours

afterwards. Second, Dr. DiMaio should have observed a drying of the lips and a graying discoloration of the lower abdomen, both of which appear within 72 hours after death *Id.* at 187. He looked for these symptoms but reported finding neither. Moreover, DiMaio reported no clouding of the cornea, he reported the corneas were clear. *Id.* This is highly unusual for someone who had died more than 72 hours prior to the autopsy. Based upon all of these reported factors, Dr. Riddick concluded that the available forensic evidence overwhelmingly pointed toward a late Saturday evening or early Sunday morning time of death. *Id.* at 197.[6]

The Director presented only one rebuttal witness -- Dennis Waters. Tr. at 334.[7] Mr. Waters testified that he was hired by Mr. Cooksey as an investigator. *Id.* at 335. He testified that he interviewed a number of witnesses. However, he could not recall their names. He testified that he visited and photographed the crime scene. *Id.* at 335-36. He said that Mr. Banks told him prior to trial that he had hitchhiked to Dallas during the early morning hours of April 12 but was unable to provide Mr. Waters with the name of the individual who picked him up. Waters did not believe this account. *Id.* at 337. Waters conceded that Cooksey never requested that he take a social history from Mr. Banks, nor obtain school records. *Id.* at 340. He also agreed that his efforts focused mostly on the guilt rather than punishment phase of trial.

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[6] This evidence debunking the State's time line was entirely consistent with expert evidence Mr. Banks had proffered before the state court that suggested that Mr. Whitehead's car – the means by which Mr. Banks purportedly traveled from the crime scene to Dallas – could *not* have made the trip to Dallas without significant repair. Such repair services were not available during the early morning hours the State contends Mr. Banks drove the ailing car from Texarkana to Dallas. Pet. RE Tab H at 1-2.

[7] Prior to the hearing, the Director had indicated that he would likely call defense counsel Cooksey as his witness. The Director rested his rebuttal without calling Mr. Cooksey.

The Magistrate Judge concluded that the record clearly established that trial counsel failed to provide constitutionally effective assistance during the penalty phase. She found "an almost complete lack of preparation," as "counsel waited until the jury rendered its guilty verdict before instructing Bank's (sic) mother to gather witnesses for the punishment phase, which began the following day." App. C at 21-22. She further determined that "counsel did not interview any of these witnesses prior to their testifying. Trial counsel admitted during an in-chambers conference that he was ignorant of the identity of the punishment phase witnesses and their possible testimony. He had to ask his client, on the record, who the witnesses were and their relationship to Banks. Even this attempt to acquaint himself with the witnesses did not occur until several had already testified." *Id.* She found the record contained ample evidence -- the severely traumatic childhood, the mental health limitations and the lack of a criminal record -- to demonstrate the likelihood of a different result had the jury heard this evidence. The recommendation was adopted by the district court.[8]

The Fifth Circuit panel reversed. The panel agreed with the district court that counsel's performance was objectively unreasonable, but concluded that the district court erred in ruling that Mr. Banks had demonstrated adequate prejudice. App. A at 33-43. The panel reached this conclusion after dividing the mitigation evidence into several categories, and, after a discussion of each, concluding that each particular type, by itself, did not establish a reasonable probability of a different result. At no time did the panel consider all the mitigation evidence collectively in

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[8] This ruling is consistent with the testimony of a prominent Texas capital trial attorney Mr. Banks presented who opined that the record showed an abject failure of trial counsel to both investigate the case and defend his client, and ample mitigation evidence that would have been persuasive with Texas jurors to reject a finding that Mr. Banks would likely commit future acts of violence.

reaching this conclusion, as had the district court, and as required by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000).[9]

c. **Suppression of Impeachment Evidence of Key Guilt Phase Witness Cook**

Mr. Banks alleged in the 1992 state habeas petition that the State, in violation of due process, had suppressed impeachment evidence concerning Charles Cook including evidence that Cook had made a deal for his testimony that would result in the dismissal of serious charges pending against him in Dallas. Representatives of Mr. Banks located Cook and he told them that he *did* have a deal for his testimony and that he had rehearsed his testimony prior to taking the stand. But Cook refused to sign an affidavit and refused to cooperate further. Mr. Banks was able to proffer only the unsigned affidavit of Cook.

The State responded by declaring that there was no deal, and filed supporting affidavits from prosecutor Elliott and Deputy Huff. It failed to disclose other impeachment material. The court found that "there was no agreement between the State and the witness Charles Cook." App. G at 2. This finding was accepted by the Court of Criminal Appeals. *See* App. D.

In his federal petition, Mr. Banks alleged *Brady* material concerning Charles Cook was suppressed. Thereafter, his representatives were able to speak with Cook again, and Cook revealed for the first time, *inter alia*, that significant portions of his testimony were false and were given under pressure from law enforcement officials. Directly contradicting his trial testimony, Cook stated his misleading testimony had been heavily rehearsed prior to trial. *Id.* On the basis of

[9] Further, the panel found that some of the evidence Mr. Banks presented at the federal hearing was unexhausted and thus could not be considered. It so held with regard to testimony from Dr. Cunningham and state's witness Vetrano Jefferson.

his affidavit and corroborative affidavits from two other state witnesses, Mr. Banks moved the court for discovery and for an evidentiary hearing. The Court granted these motions.

In compliance with the discovery order, the District Attorney's office turned over, *inter alia*, a 74-page interview of Charles Cook by law enforcement officials transcribed shortly before trial. The transcript, which had never been disclosed previously, contained considerable impeachment material.[10] Both Mr. Banks and the Director confirmed in pre-hearing submissions that the transcript would be introduced into evidence. Prior to the hearing, the Court entered an order to clarify the issues on which the parties could submit testimony. One such issue was whether the trial prosecutors had failed to disclose impeachment evidence concerning key guilt phase witness Charles Cook.

At the hearing, the transcript of the September, 1980 interview of Cook was offered into evidence and received considerable attention. Tr. Ex. B-04. Prosecutor Elliott confirmed that this document was generated during interviews conducted shortly before trial. He identified handwritten notes on several pages and identified the writing as that of his co-counsel, Raffaelli, and stated that Raffaelli possessed the transcript at trial. Tr. at 45-47.[11] Elliott conceded that the transcript was not turned over to the defense prior to or during trial. Tr. at 47. The trial record indicates that only Mr. Cook's April, 24, 1980 statement to police was disclosed at the conclusion

[10] It showed, for example, that Cook could not keep his story straight on even basic events, and repeatedly described significant events differently from his April. 1980 statement. Throughout the interview, law enforcement officials mocked his credibility. Pet. RE Tab F.

[11] Mr. Raffaelli was the elected District Attorney at the time of trial. He died prior to the hearing below.

of Cook's direct testimony. 9SR at 2312. Mr. Elliott testified he elected to disclose the lengthy transcript to Mr. Banks only to comply with the Magistrate Judge's discovery order. Tr. at 69.

Charles Cook testified that he spoke with law enforcement extensively about his testimony prior to trial. Tr. at 135. He also stated that much of his trial testimony was rehearsed and that key portions were not truthful. Tr. at 137-38, 144-46.

Even though Mr. Banks extensively briefed this issue, the Magistrate Judge failed to adjudicate this claim. Mr. Banks filed a timely objection to this failure. On August 18, 2000, the District Court also refused to adjudicate the claim, concluding that Mr. Banks should have formally amended his petition after receiving disclosure of the pretrial statement, and that the issue had not been tried by consent per Federal Rule of Civil Procedure 15(b). The Court thereafter rejected Mr. Banks's motion to modify or amend the judgment. 5R at 1209-17, and further denied issuance of a Certificate of Appealability, (COA).

The Fifth Circuit panel also refused to issue a COA. The panel held that Mr. Banks had failed to demonstrate that the question of whether an "evidentiary hearing" in a habeas proceeding is the functional equivalent of a "trial" for FRCP 15(b) purposes is one that jurists of reason would find debatable. App. A at 48-52.

d. Racial Discrimination in Jury Selection

Mr. Banks alleged a *Swain v. Alabama*, 380 U.S. 202 (1965), jury discrimination claim in the 1992 state petition and proffered voluminous statistical and testimonial evidence demonstrating that the District Attorney's office had for years routinely and systematically excluded African Americans from felony jury service by peremptory challenge. In February, 1993, the state trial court recommended that relief be denied without an evidentiary hearing. App. G. at

2-3. Mr. Banks appealed, and the Texas Court of Criminal Appeals ordered the trial court to hold an evidentiary hearing on this claim. App. F at 1.

At the evidentiary hearing, Mr. Banks presented statistical, expert and direct evidence establishing that during the six-year period leading up to his trial, from 1975 through 1980, Bowie County prosecutors accepted more than 80% of qualified white jurors in felony trials but peremptorily struck more than 90% of similarly qualified African American jurors. Several attorneys who represented criminal defendants testified that prosecutors routinely struck black jurors. The evidence also showed that prosecutors habitually utilized race-coded jury strike sheets. Trial counsel, the former elected District Attorney, testified that he did not object to the exclusion of African American jurors from Mr. Banks' jury because he believed there was no legal basis for a *Swain* challenge because he was aware of *one* case in which the prosecution had allowed blacks to sit on a felony jury. The state proffered reasons, which it claimed were race-neutral, for striking each of the African American jurors.

The state habeas court rejected Mr. Banks' *Swain* claim. Although it concluded that the evidence from 1979 and 1980 was sufficiently strong to establish a *prima facie* case of discrimination, it believed that the prosecutor's articulation of race neutral reasons for the four peremptory strikes in Mr. Banks' case sufficiently rebutted the *prima facie* showing. App. E at 5, 9. The court deemed the data from 1975-1978 to be irrelevant because the District Attorney prosecuting Mr. Banks was not in office then. App. E at 5. It also found trial counsel's failure to object defaulted the claim. *Id.* at 2-3. On the basis of these findings, the Court of Criminal Appeals denied relief. App. D at 1.

Mr. Banks raised the claim in his federal petition. The Magistrate Judge permitted him to submit two affidavits to supplement the record made before the state court. The district court denied relief after concluding it was procedurally defaulted, and refused to issue a COA. App B at 4. The panel below also refused to issue a COA because it found the claim defaulted. It held that while Mr. Banks had established "cause" for counsel's failure to timely object, the state court's determination that the prosecution's justifications for striking the four jurors were race-neutral foreclosed a finding of "prejudice" to overcome the default. App. A at 63-74.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case warrants review for a number of substantial reasons. First, the Fifth Circuit's reversal of relief on the Farr issue conflicts sharply with *Strickler v. Greene* and decisions from other Courts of Appeals. In this case, the State's assurances at trial that discoverable material would be disclosed were much stronger than in *Strickler;* here, the trial prosecutors promised to affirmatively reveal such information, and after Farr – their key penalty phase witness – testified untruthfully that he was not an informant, they not only did not correct this misrepresentation, but instead they assured the jury Farr had been truthful. *Strickler's* holding that habeas counsel can rely upon such assertions in guiding post-conviction investigation was given no weight by the Fifth Circuit panel. Moreover, other decisions from this Court show the panel's materiality ruling to be erroneous as well.

Second, its reversal of relief on penalty phase ineffectiveness grounds cannot be harmonized with *Williams v. Taylor* and numerous other decisions from Courts of Appeals. The character and quantity of the evidence is indistinguishable from that found sufficient in *Williams*, a case the panel did not cite. Moreover, unlike *Williams*, where the petitioner had a substantial and

violent criminal history, Mr. Banks had no such history. Consistency in the enforcement of the law requires certiorari to review the panel's decision.

Third, the panel's refusal to even consider another meritorious *Brady v. Maryland* claim, this one concerning powerful impeachment evidence of the state's key guilt phase witness because an "evidentiary hearing" in habeas proceedings is not a "trial" for Rule 15(b) purposes, is inconsistent with *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 509 U.S. 680 (1993). This Court has long held that where appropriate, the Federal Rules of Civil Procedure apply in habeas actions, and there is no reason why that rule should not fully apply to claims litigated in habeas actions.

Finally, the panel's holding that Mr. Banks' *Swain v. Alabama* claim is defaulted is inconsistent with *Ford v. Georgia*, 498 U.S. 411 (1991), because there was no established rule requiring trial level *Swain* objections. Moreover, the panel's reliance upon the state court finding that the State adequately rebutted the prima facie showing of discrimination rests squarely upon a mistaken rule of law that led the state court not to consider much of Mr. Banks' pattern and practice evidence. The Court is presently considering this same issue in *Miller-el v. Cockrell*, No. 01-7662. It should at least hold this case until that case is decided.

ARGUMENT

The Fifth Circuit's Reversal on the Farr Claim Is Entirely At Odds With *Strickler v. Greene* And Precedents from Other Circuits

The panel concluded that the district court erred in granting sentencing relief because the key evidence presented in support of the claim – the testimony of informant Robert Farr and Deputy Huff – was not first presented to the state courts, and because Mr. Banks failed to

establish adequate cause to excuse this failure. Moreover, the panel held that relief should also have been denied because the non-disclosed information was not material. Respectfully, both these conclusions are contrary to governing law and warrant review.

a. **The panel's "cause"determination is inconsistent with *Strickler v. Greene***

In concluding that Mr. Banks failed to take sufficient steps to discover the Farr and Huff evidence while the case was pending before the state habeas court, the panel accepted the Director's argument that the state had not interfered with Mr. Banks' access to either witness and that there was an insufficient showing as to why Mr. Banks could not have spoken to Farr prior to the conclusion of these proceedings. But neither the panel nor the Director discuss the case that governs this issue, *Strickler v. Greene*, 527 U.S. 263 (1999), nor explain why it does not require affirmance of the district court's opinion on this point.

In *Strickler*, a Virginia capital habeas petitioner attempted to raise a *Brady* claim in federal district court without having first presented either the claim or supporting evidence in state court. The claim was based upon a number of police documents Strickler obtained pursuant to discovery in the federal court that contained impeachment material concerning an important state witness. At trial, the prosecutor had maintained an open file policy and the defense reviewed the file on several occasions. However, several documents later uncovered in federal discovery were not included in the trial file. During state post-conviction proceedings, new counsel for Strickler alleged that trial counsel had been ineffective for failing to file a discovery motion seeking *Brady* material. The state responded that such a motion was unnecessary because of the open file policy, and the state courts dismissed the petition. After discovering the documents while in federal court, Strickler pleaded a *Brady* claim. The district court found adequate cause for the failure to present

the claim in state court because Strickler had no independent access to the documents and state actors had repeatedly withheld them throughout the state proceedings. The court of appeals reversed. The panel concluded that Strickler defaulted the claim in state post-conviction because he could have developed the factual basis there but did not. He knew that the witness had been interviewed by police on several occasions prior to trial, and state law allowed him to seek discovery; had he filed a motion it is likely the state court would have granted it.

This Court rejected that analysis. The Court focused upon the circumstances in the trial court as those events would naturally influence the reasonable decisions of state habeas counsel. In *Strickler*, the habeas attorney knew that prior to trial, Strickler's counsel received open file discovery, but the key documents were not disclosed. It was reasonable for trial counsel to assume that the prosecutor would discharge his duty and disclose all exculpatory material. The Court concluded that "if it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory material, but also the implicit representation that such material would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel . . . in state habeas proceedings was equally reasonable." 527 U.S. at 284. Thus, events concerning discovery in the trial court are highly relevant to a habeas petitioner's duty to investigate in state post-conviction proceedings. In this case, the panel ignored this controlling rule of law.

In Mr. Banks' case, the trial prosecutors not only assured him that all discoverable material would be provided without the need for a discovery motion, there were explicit representations (later proven to be untrue) that Farr was neither an informant nor had been paid for his services in this case. Prior to trial, trial prosecutors wrote to counsel and explained they

were prepared to provide discovery; there was no need for Mr. Banks to file a discovery motion. Mr. Banks had previously asked Deputy Huff to disclose the identity of the informant he mentioned in pretrial testimony. Huff had refused. At neither phase of trial did Farr tell jurors that he was an informant or had been paid in this case. Indeed, he expressly denied receiving any such payment when asked. The prosecutors not only did not correct this misrepresentation, they assured the jury that Farr had been honest. Thus, in the trial court proceedings, the state promised to disclose such material, did not correct the witness when he failed to disclose his true status, and then guaranteed jurors that Farr's testimony had been completely truthful.

Given these circumstances, *Strickler* teaches, trial counsel and Mr. Banks could reasonably conclude that whomever the informant was, it was *not* Robert Farr. And, as *Strickler* makes clear, if it was reasonable for trial counsel to so conclude, it was equally reasonable for habeas counsel to conclude similarly, as neither counsel nor Mr. Banks had any reasonable way to determine otherwise.[12] *See also Williams v. Taylor*, 529 U.S. 420 (2000)(juror bias and prosecution misconduct claims not barred in federal court because of petitioner's failure to raise in

[12] The panel speculated that had Mr. Banks simply made the efforts, he likely could have spoken to either Farr or Huff while the case was pending in the state habeas court. The record provides no support for this view. Robert Farr wanted no part in speaking to anyone about his work as a police informant. Not long after Mr. Banks' trial, he was warned by his law enforcement handlers that he should leave Texas as his life was in danger. He first went to Oklahoma and then to California to hide. While the panel states that Mr. Banks filed his federal petition only *after* contacting Farr, *see* App. A at 9, Mr. Banks had no luck in finding Farr until six months after the petition was filed. He was not happy when he was finally located, told Mr. Banks' representative that he would not have spoken with her previously, and made it clear that he would not return to Texas to testify voluntarily. While the Director had every opportunity to speak to Farr, or to command his presence at the federal hearing to challenge any of his assertions, it chose not to do so. Similarly, Deputy Huff did not volunteer any information about Robert Farr, and indeed, sought clarification from the court while on the witness stand that he could then reveal that Farr had served as his informant in this case. Tr. at 96.

state court as underdevelopment of claims were attributable to juror and prosecutor; defense counsel did not default claim by failing to check public records concerning each juror).[13]

b. Materiality Determination Is Also Inconsistent with Settled Law

The materiality inquiry requires a court to determine whether the missing "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). A review of the entire trial record is necessary to make this determination reliably. In *Strickler*, one important factor the Court focused on repeatedly was how the case was cast for the jury by the prosecution. *See Strickler* at 307-08. Here, the panel's analysis failed to focus upon such factors critical to the materiality analysis.

Farr offered uniquely damaging evidence. He testified that Mr. Banks was going to Dallas to obtain a weapon so that Banks could commit armed robberies, and, if necessary, kill reluctant victims. This testimony was both the heart and soul of the state's case for the death penalty and was uncorroborated.[14] The jury was explicitly urged to rely heavily on this evidence in its deliberations. One prosecutor characterized Farr's testimony to be "of the utmost significance," because it established Banks posed a "danger to friends and strangers alike." 9SR at 2593. The

[13] The Fifth Circuit's decision conflicts with other well-reasoned decisions in the circuits as well. *See e.g., Scott v. Mullin*, 303 F.3d 1222, 1228 (10th Cir. 2002)(mere speculation that exculpatory evidence may have been withheld does not impose duty on counsel to advance claim); *Crawford v. Head*, 2002 U.S. App. LEXIS 23420, *108-*109 (11th Cir.)(same); *White v. Helling*, 194 F.3d 937, 924-44 (8th Cir. 1999)(withholding of exculpatory evidence contributed to petitioner establishing cause for failure to raise *Brady* claim prior to federal habeas).

[14] The testimony of Vetrano Jefferson, Banks' common-law brother-in-law, concerning their fight was not evidence showing a likelihood of future dangerousness. *See Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991)(fight between in-laws "not particularly probative" of whether defendant would commit criminal acts of violence that would constitute a continuing threat to society.)

other prosecutor assured jurors they could trust Farr as he had been "open and honest with you in every way." 9SR at 2579.

It is now beyond debate that Farr was not "open and honest . . . in every way;" he lied about not being a paid informant. Further, his narrative that made Mr. Banks appear exceedingly dangerous – that Banks was going to Dalles to get a gun so he could commit violent crimes and kill, if necessary – was a fiction. The prosecutor's plea to the jury to consider Farr's testimony as it was "of the upmost significant" is irrefutable evidence of the importance of Farr and his misleading narrative to the state's case for future dangerousness.

The panel's decision reversing the grant of relief is contrary to this Court's precedents beginning with *Giglio v. United States*, 405 U.S. 150 (1972), with other circuit decisions, *see e.g., Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999)(evidence undermining credibility of key witness material); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989)(misleading remarks by prosecutor that key witness had been completely forthcoming both improper and highly prejudicial); *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999)(witness testimony material particularly where prosecutor makes repeated reference to it in closing argument), and even other Fifth Circuit precedent *East v. Johnson*, 123 F.3d 235 (5th Cir. 1999)(*Brady* violation concerning witness prosecutors placed more reliance upon than any other witness to establish future dangerousness was material). Review is warranted to provide guidance to the lower courts.

The Panel Opinion Reversing the Grant of Relief Based on Counsel's Ineffectiveness at the Penalty Phase Ignores Settled Precedent to the Contrary

The panel committed similar error in rejecting the district court's determination that Mr. Banks demonstrated that trial counsel's plainly deficient performance showed a reasonable probability that, but for that performance, the jury would have rejected the death penalty.

a. **The panel decision is flatly inconsistent with *Williams v. Taylor***

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court considered an ineffective assistance of counsel claim that is nearly identical to the one raised by Mr. Banks.[15] Williams' trial counsel, like Mr. Banks', made next-to-no preparation for the penalty phase and had presented evidence at the sentencing phase only to the effect that Williams was a nice guy and had turned himself in. 529 U.S. at 369. During state habeas proceedings, new counsel proved that trial counsel had not begun to prepare for the sentencing phase until a week prior to trial and that readily available evidence could have shown the jury that, as a child, Williams had been repeatedly beaten by his father, had been sorely neglected by his parents, was slow mentally and yet was a good candidate to be an obedient prisoner. After hearing this evidence, the sentencing judge found that it raised a reasonable probability that the sentencing decision would have been different and recommended relief. *Id.* at 371. The state supreme court rejected this recommendation. It characterized the new mitigating evidence as showing only that Williams was not violent and

[15] There are two major differences in the cases that cut in Mr. Banks' favor. First, while Mr. Banks had no prior criminal record, Williams had an extensive one that included prior acts of violence. 529 U.S. 362 at 368-9. Second, the *Williams* case was governed by the 1996 amendments to the habeas corpus statute that forbid the granting of relief unless the state court judgment was contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). This is a pre-AEDPA case and thus the review standard is *de novo*.

could cope well in a structured environment, but when it compared the evidence with Williams' extensive criminal history, concluded there was no reasonable probability that the sentencing decision would have been different. *Id.* at 371-2

The Court found this judgment not only to be a mistaken application of *Strickland v. Washington*, but also to be an objectively unreasonable one. First, the panel demanded that Williams show the outcome of his sentencing proceeding *would* have been different, a standard *Strickland* expressly rejected. Second, the decision was unreasonable because it failed to evaluate the totality of the mitigating evidence in the record against the aggravating evidence. *Id.* at 397-8.

The panel decision here is similarly sharply at odds with *Williams*. First, the panel, like the state supreme court in *Williams*, never evaluated *all* of the mitigating evidence in this record against the aggravating evidence. Second, as the mitigating evidence in this record is very similar in quantity and character with that in *Williams*, and as the aggravating evidence in *Williams* was vastly greater than the evidence here, proper application of *Williams* requires affirmance of the district court's grant of habeas relief. The court below, however, considered the mitigation evidence in the record by separating it into categories, and then asking whether each type of evidence, in isolation from the other, was sufficient to raise a reasonable possibility that the jury would not have returned the death penalty. *See* App A at 37-41. It characterized the psychological evidence from Dr. Pina – who thoroughly documented a long list of neurological and psychological problems in addition to a history of several significant childhood traumas of a deeply scarring nature – as only "possibly mitigating," and concluded this evidence does not satisfy *Strickland's* prejudice prong. *Id.*, at 39. It next briefly summarized the family dysfunction evidence from Mr. Banks' parents and again concluded the evidence, by itself, did not establish

Strickland prejudice. *Id.*, at 40. At no time did the panel consider *all* of the evidence together in addressing the question of whether counsel's uncontested deficient performance raised a reasonable probability of a different sentencing decision. This is plain error under *Williams*.

When all of the record evidence is considered, Mr. Banks' mitigation case is indistinguishable from the one the *Williams* Court found sufficient to warrant habeas relief. Mr. Banks, at the time of his trial, was a man of limited intellectual functioning; he had clearly defined neurological deficits and organic injury that significantly impaired his memory and ability to plan or deal with changing events. RES's RE at Tab 15 p. 3-4. Moreover, he had endured a number of deeply traumatic events in his childhood, and, through no fault of his own, was highly allergic to many substances, and these allergies caused severe skin disfigurement. He was shunned and ridiculed by his peers throughout his life. Furthermore, his father was chronically abusive and alcoholic and regularly beat and terrorized Mr. Banks, his mother and siblings. RES's RE at Tab 7 p. 1-5 &Tab 15 p. 4-5. Nevertheless, Mr. Banks was a very good candidate for peaceful adjustment to the prison structured environment. RES's RE at Tab 15 p. 7. As the *Williams* opinion makes clear, this type of sentencing portrait, which Mr. Banks' jury never heard and the state never rebutted, is precisely the type of evidence that can persuade a jury to reject imposition of a capital sentence.

Indeed, in *Williams*, the Court held that such evidence is significantly mitigating, so much so that even strong aggravating evidence does not defeat a *Strickland* claim. The amount and character of aggravating evidence in *Willliams* is staggering in comparison with the evidence in this record. While Mr. Banks had no prior criminal record, Williams had two prior felony convictions, one for armed robbery and, shortly before committing the murder of the elderly

victim in the capital prosecution, had severely beaten an elderly woman leaving her in a vegetative stage. 529 U.S. 362 at 368-9. Yet all of this aggravating evidence was not sufficient to persuade this Court that the mitigating evidence the jury never heard would not have raised a reasonable probability of a different sentencing result.[16]

The Panel Opinion Denying A Certificate of Appealability On Whether Fed. R. Civ. P. 15(b) Applies To Evidentiary Hearings In Habeas Proceedings Is Sharply Inconsistent with Governing Law

Mr. Banks is entitled to a certificate of appealability and to review of his meritorious claim concerning the state's suppression at trial of the lengthy pretrial statement authorities took from key witness Charles Cook that contains a comprehensive array of impeachment evidence. The district court refused to review the claim pursuant to Fed. R. Civ. P. 15(b), and the panel denied issuance of the certificate because Mr. Banks failed to show that an evidentiary hearing is the functional equivalent of a trial for Rule 15(b) purposes. This decision is entirely inconsistent with case law that shows not only that this is a debatable point, but that 15(b) applies to habeas cases.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." The Court has long applied a functional approach in determining which rules of civil procedure apply in the habeas context. *See McFarland v. Scott*, 512 U.S. 849, 866 n.2 (1994)(Thomas, J., dissenting)("The Federal Rules of Civil Procedure apply in the context of habeas suits to the

[16] The panel opinion is incompatible with other court of appeals decisions where the mitigating evidence not presented before the jury was similar as here. *See e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000)(neglectful and abusive childhood, mental deficits and low intellectual functioning established *Strickland* prejudice); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000)(troubled childhood and head injuries sufficient to show *Strickland* prejudice).

extent that they are not inconsistent with the Habeas Corpus statute."). Thus, the Court has held that while the broad discovery provisions of the rules of civil procedure do not apply because Rule 6 of the Rules Governing Section 2254 Cases limits discovery "to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise," *see Harris v. Nelson*, 394 U.S. 286 (1969), Rules 52(b) and 59, which govern motions to reconsider, do apply as there is "no reason to hold to the contrary." *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 270 (1978).[17]

With regard to Rule 15(b) and habeas corpus proceedings, the Court has sent strong signals that the rule applies to habeas corpus proceedings without qualification. *See generally Calderon v. Ashmus*, 523 U.S. 740, 750 (1998)(Breyer, J., concurring)(pre-AEDPA habeas regime consistent with Rule 15 amendment standard). Indeed, the Court has previously assumed that Rule 15(b) applies to habeas proceedings. In *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969), the Court referenced the rule as one of a number of "noncontroversial rules" that the federal courts have applied in habeas proceedings. More recently, in *Withrow v. Williams*, 507 U.S. 680 (1993), the Court again made the same assumption. There, a prisoner had filed a one-claim petition alleging that his custodial statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court agreed, found that statements taken prior to the administration of *Miranda* warnings should have been suppressed and ordered a new trial. In addition, the court determined that statements taken *after* the administration of the warnings were involuntary. The

[17] The *Browder* Court determined that no other federal statute addressed the issue of timeliness of motions to reconsider the grant or denial of habeas decisions and that habeas practice did not differ from other civil proceedings in this regard. Moreover, the goal of Rules 52(b) and 59 in the civil context – just and speedy adjudication – is entirely consistent with the swift determination of habeas corpus claims. *See* 434 U.S. at 270-71.

warden argued that this second ruling was improper because Williams had not raised the involuntariness claim in either the state courts or in his habeas corpus petition. Williams argued that while he had not pleaded the due process claim in his federal petition, the matter was tried by implied consent of the parties. The Court assumed Rule 15(b) applied to habeas proceedings, but reversed the lower court's grant of relief on the due process ground because the record "reveals neither thought, word, nor deed of [the Warden] that could be taken as any sort of consent to the determination of an independent due process claim, and [the Warden] was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on the claim's resolution." 507 U.S. at 696.

This line of authority suggests strongly that Rule 15(b)'s application to habeas corpus evidentiary hearings is, at the very least, one that "jurists of reason would find debatable." Moreover, it further suggests that jurists of reason would conclude that the *Withrow* Court's assumption -- that Rule 15(b) governs the question of whether an issue was or wasn't adjudicated by implied or express consent – is correct, as habeas evidentiary hearings are conducted similarly to civil trials. And unlike the discovery context, where civil and habeas practice is decidedly different, there is no reason to treat the litigation by consent of a claim not specifically pleaded in a civil trial differently from a claim not so raised in a habeas petition.

In this capital proceeding, some court should review the lawfulness of the state's suppression of a transcript revealing that the state's key witness was unworthy of belief. The record unambiguously shows that the state suppressed this document from the time of trial until, nearly 19 years later, the Magistrate Judge ordered it disclosed. The circumstances of its suppression were fully litigated below, *after* the Director had ample notice that Mr. Banks'

pleaded *Brady* claim included this issue. Certiorari is appropriate to confirm what the Court has strongly intimated in *Harris* and *Withrow* – that Rule 15(b) applies to habeas proceedings.

The Panel's Holding That Mr. Banks' *Swain* Claim Is Defaulted Conflicts With Established Law

The panel below refused to issue a Certificate of Appealability to address Mr. Banks' meritorious *Swain* claim, because it determined that jurists of reason would not find debatable whether the failure of trial counsel to object defaulted the claim, or whether Mr. Banks could establish sufficient "prejudice" to excuse the default. Both ruling are in sharp conflict with governing law.

a. **No Firm Rule Required *Swain* Objection at Trial**

The Court has made clear that in order to constitute an adequate and independent ground sufficient to support a finding of procedural default, a state rule must be "firmly established and regularly followed" at the time of the alleged default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984); *see also Johnson v. Mississippi*, 486 U.S. 578 (1988). Throughout this litigation, neither the Director nor the lower courts have identified the existence of such a rule in force and effect at the time of the alleged default – September, 1980.

If such a rule existed, the State would surely have asserted this argument when Mr. Banks first raised his *Swain* claim during his first state post-conviction proceeding in 1983. The State did no such thing, and argued instead that the claim should be denied on the merits. As the record shows, both the trial court and Court of Criminal Appeals rejected this claim on its merits, even though there had been no objection at trial. App. A at 63-64.

Indeed, when Mr. Banks again raised this claim in his 1992 state petition, the State initially made no claim of default, though it did argue that other claims were defaulted because of a failure to raise them at trial. The first assertion of default of the *Swain* claim came on appeal. Even then, the State cited no case holding a trial objection was required for *Swain* claims in 1980.

After the 1993 evidentiary hearing on this claim that had been ordered by the Court of Criminal Appeals, the trial court found that (1) trial counsel had not raised an objection during the trial proceedings, and (2) this failure constituted a default. App. E at 2-4. But the sole authority cited for this rule was *Matthews v. State*, 768 S.W.2d 731 (Tex. Crim. App. 1989), a case decided nine years *after* Mr. Banks' trial holding (for the first time) that claims based upon *Batson v. Kentucky*, 476 U.S. 79 (1986) would be treated as defaulted in the absence of a trial objection. It relied upon no case pre-dating Mr. Banks' trial placing trial counsel on notice that a *Swain* claim would be defaulted if not raised at trial. When the Court of Criminal Appeals adopted the trial court's decision, it identified no case setting forth a firm default rule applicable in 1980. App. D.

The district court denied relief, in part, because of the absence of a trial court objection, but, like the state courts, identified no case that placed Mr. Banks on notice that a *Swain* claim must be asserted at trial or lost. See App. C at 35. And in the court below, the Director did no better. He conceded that the one state decision that was available at the time of trial, *Chambers v. State*, 568 S.W.2d 313 (Tex. Crim. App. 1978), did *not* set forth a clear trial default rule for *Swain* claims, and that the Court of Criminal Appeals did not clarify the status of such a rule until *Williams v. State*, 773 S.W.2d 525 (Tex. Crim. App. 1988), well *after* Mr. Banks' trial. *See* Director's Reply Br. at 59-60. The case upon which Mr. Banks relies – *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988) – cannot be written off as an "occasional act of grace."

Rather, it confirms that the absence of a trial objection in 1980 did not bar merits review of a *Swain* claim in later post-conviction proceedings. Haliburton's trial, like Mr. Banks', took place in 1980, and his counsel made no *Swain* objection at trial. He was allowed to be heard on his *Swain* claim in his third state post-conviction proceeding because the absence of a trial objection did not bar the claim from being litigated in the later proceeding.

The Fifth Circuit's decision lacks the fundamental ingredient to sustain the state court's default holding: a clearly established rule that the failure to make a trial objection would bar later review of a *Swain* claim. *Ford v. Georgia, supra.*

b. The Panel's "Prejudice" Determination is Also Erroneous

While the panel determined that Mr. Banks showed adequate "cause" to overcome trial counsel's default, it held that, for COA purposes, "Banks has failed to show prejudice sufficient to overcome the bar. In light of the state court's findings of a prima facie *Swain* violation, the State proved that, for Banks' trial, no black venire member was excluded because of his or her race." App. A at 74.

This ruling relies entirely upon the state court decision that the prosecution had sufficiently overcome the prima facie case. But that ruling was fundamentally flawed because it refused to consider much of the evidence Mr. Banks introduced to demonstrate that a firmly established policy of excluding black jurors from jury service – and not a careful evaluation during voir dire – motivated the removal of the four black jurors in this case.

Mr. Banks' evidence looked at jury striking behavior from January, 1975 through September, 1980. This evidence showed that in seventeen felony cases tried in 1979 and 1980, 524 jurors qualified to serve. Pet. Tab K. Of this number, the race of 494 were identified. Blacks

accounted for 84 of these jurors; prosecutors removed peremptorily 76 of them. *Id.* Of a total of 204 jurors who actually served on juries, only 6 were black. In fifteen of the seventeen juries, the jury was either all-white or contained only one black juror. *Id.*

Data from 1975 through 1978 showed nearly *identical* rates of exclusion of blacks. While 84 African Americans made up 13% of the pre-peremptory pool, 79, or 94% ,were peremptorily struck by the State. Pet. RE Tab L. Of the 204 jurors who sat on juries, only five were black. *Id.* This evidence shows a stark pattern and practice that resulted in more than 9 out of every 10 qualified blacks peremptorily struck.

All of this evidence was plainly relevant to Mr. Banks' *Swain* challenge. *Swain* itself requires a showing of purposeful removal over a significant period of time. And because establishment of a particularly stark practice of discrimination strengthens the inference of intent, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976), it is relevant when assessing whether the justifications for the strikes are race-neutral or pretextual.

The state court refused to consider *all* of Mr. Banks' evidence from 1975 through 1978 because "no State action was taken against Mr. Banks by the Bowie County District Attorney's Office under Mr. Cooksey," the District Attorney at the time. App. E at 4. The Court seemed to reason that because there was a change in the District Attorney in 1979, the evidence from before that time was not relevant.

The evidence Mr. Banks presented shows a seamless pattern of purposeful exclusion from 1975 though Mr. Banks' 1980 trial. Throughout, the prosecutors accepted more than 80% of the qualified white jurors and struck more than 90% of the black jurors. Race-coding of juror forms

was practiced throughout the time period. And the record from 1979 through Mr. Banks' trial of the surviving prosecutor who tried Mr. Banks clearly shows adherence to the policy to remove black jurors. He participated in two trials prior to Mr. Banks' case, and although thirteen black jurors were in the pre-peremptory strike pool in those cases and Mr. Banks' case, *none* of those jurors served; *each* was removed by the State's peremptory strike, and each of the three juries was all-white. SHTr.3 at 894-95, 912. Moreover, the prosecutor had observed the seating of six additional juries prior to Mr. Banks' trial. In those cases, prosecutors struck a total of 23 of 27 Black jurors in the pre-peremptory pools. *Id.* at 915. Even Elliott agreed that the total numbers of jurors who served in those nine trials–127 white jurors and only 3 Black jurors–was a "striking disparity." *Id.* at 916.

The refusal of the state court to consider much of Mr. Banks' pattern and practice evidence – both in determining the strength of his prima facie case, and also when considering the legitimacy of the reasons provided by the State justifying removal of the four black jurors in this case – is a clear mistake of law. *Arlington Heights*; *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Such evidence is relevant and uniquely probative of motivation. Indeed, the Court has before it in *Miller-el v. Cockrell*, No. 01-7662, the related question of the role of pattern and practice evidence in the

v. Kentucky, 476 U.S. 79 (1986) context. At the very least, the role of pattern and practice evidence in the determination of justifications for strikes is an issue that jurists of reason would find debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Thus, certiorari is warranted because the Fifth Circuit's ruling that Mr. Banks' meritorious *Swain* claim is defaulted is contrary to this Court's jurisprudence.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Banks respectfully moves the Court to grant review of this matter.

Respectfully submitted,

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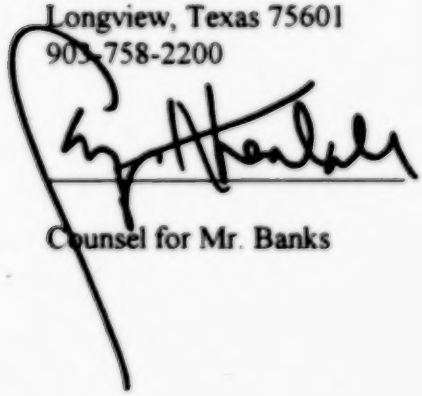

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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-8286 (3)

DELMA BANKS, Jr.,
Petitioner,

-vs-

JANIE COCKRELL, Director,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 20 2002
CHARLES R. FULBRUGE III
CLERK

No. 01-40058

DELMA BANKS, JR.,

Petitioner-Appellee-Cross-Appellant,

versus

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(5:96-CV-353)

Before HIGGINBOTHAM, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:*

For the capital murder conviction of Delma Banks, Jr., the State of Texas contests the partial habeas relief for the death sentence, the issues being: whether, in violation of ***Brady vs. Maryland***, 373 U.S. 83 (1963), the State withheld evidence that one of its witnesses was a paid police informant; whether, for the penalty phase, Banks' trial counsel was ineffective; and whether cumulative error is a basis for relief.

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Concerning the denial of habeas relief for his conviction, Banks seeks a certificate of appealability (COA), claiming: two other ***Brady*** violations; ineffective-assistance at the guilt phase; violation of ***Swain v. Alabama***, 380 U.S. 202 (1965) (prosecutors' purposeful, systematic, discriminatory exclusion of venire members); and insufficient evidence.

COA and HABEAS RELIEF DENIED; therefore, REVERSED and RENDERED.

I.

The murder at issue occurred 22 years ago. Court proceedings since then have included the direct appeal, three state habeas petitions with evidentiary hearings, and an extensive evidentiary hearing for the federal petition at issue.

A.

On Monday morning, 15 April 1980, Richard Whitehead was found dead in a park near Nash, Texas, in Bowie County. ***See Banks v. State***, 643 S.W.2d 129 (Tex. Crim. App. 1982), *cert. denied*, 464 U.S. 904 (1983). (Nash is near Texarkana.) He had been shot twice in the head and once in the upper back. Fisher, who lived near the park, reported being awakened by two gunshots the preceding Saturday, 12 April, at approximately 4:00 a.m.. And, Hicks and Bungardt, two female acquaintances of the victim, told investigators he was last seen alive the preceding Friday evening, 11 April, with a black male, whom they later identified as Banks.

As a result, Bowie County Deputy Sheriff Huff, the lead investigator, contacted police informant Farr and told him he would pay Farr $200 if he could obtain Banks' gun. On 23 April, eight days after the victim was found, Farr, Banks, and Marcus Jefferson drove to Dallas to obtain a gun.

Bowie and Dallas County authorities monitored the trip and observed Farr's automobile, *driven by Banks*, stop at a south Dallas house; Banks go to the door and soon return; and the automobile drive away. *Id.* Officers stopped the automobile and seized a .22 caliber pistol; it was not the murder weapon.

Banks was arrested. Farr and Jefferson were detained but released the next morning.

In addition, that next morning, Officers returned to the south Dallas house and interviewed an occupant, Cook, who provided the following in a statement (April 1980 statement): Banks stayed with him the weekend of 12 April (weekend of the murder); Banks was driving an automobile matching the description of the victim's; during the weekend, Banks admitted to Cook he had killed a "white boy"; prior to Banks' returning to Texarkana after that 12 April weekend, he left the automobile and a .25 caliber pistol with Cook to discard; and Cook abandoned the automobile in west Dallas and sold the pistol to a neighbor.

Deputy Huff seized the pistol from the neighbor and submitted it for forensic testing. The state forensics lab reported it was the murder weapon.

B.

At a 21 May 1980 examining trial, Deputy Huff summarized the State's case and recounted the events leading to Banks' arrest. The Deputy did not disclose, however, that payments were made to Farr. He did disclose that Hicks and Bungardt reported the victim's automobile was having alternator problems (discussed *infra*).

The following day, Banks was indicted for capital murder.

C.

Prior to trial that Fall, the Bowie County District Attorney's office advised Cooksey, Banks' attorney, there would be no need to litigate discovery issues: "We will, without the necessity of motions[,] provide you with all discovery to which you are entitled". That August, Cooksey filed several standard pretrial motions, including for discovery; he did not seek a pre-trial hearing.

The first day of jury selection, Cooksey reported to the trial judge that he had not seen the State's witness list. (It had been provided to him the previous week.) Nor did Cooksey object when, in selecting the jury, the prosecution peremptorily struck the four qualified black potential jurors. After jury selection, prior to

further proceedings, Cooksey complained the State had not provided a list of the prior convictions of the State's witnesses.

Hicks and Bungardt testified that Banks was with the victim on Friday, 11 April, and that the victim's automobile required a battery-jump in order to start.

Fisher testified he heard the two gunshots at approximately 4:00 a.m. on Saturday morning, 12 April.

Farr testified: he accompanied Banks to Dallas to secure a pistol; they stopped at Cook's; and Banks reported the .22 caliber pistol he secured from Cook was not his, because his pistol was "in west Dallas". Farr admitted using illegal drugs, but *denied* being a paid informant and speaking with any police officers.

Cook testified: Banks arrived at approximately 8:30 a.m. on 12 April in a green Mustang and stayed with him for two days; Banks admitted to killing a white man in Texarkana; at Banks' request, Cook sold a pistol Banks had left with him and abandoned Banks' car.

Cook's sister testified she met Banks when he arrived with Cook in a green Mustang.

Cook's neighbor confirmed he purchased a .25 caliber pistol (later identified as the murder weapon) and other items from Cook approximately one week before authorities seized the pistol.

Dr. DiMaio, the State's medical examiner, testified the victim

died from three gunshot wounds but did not testify as to the time of death.

Firearms examiner Jones testified the bullets recovered from the victim and the crime scene had been fired from the pistol retrieved from Cook's neighbor.

Banks did not present any evidence. The jury found him guilty of capital murder. ***Id.*** at 132.

At the penalty phase, the State presented two witnesses: Farr and Vetrano Jefferson. Vetrano Jefferson was the brother of Banks' common-law wife and the older brother of Marcus Jefferson (who had accompanied Banks and Farr to Dallas eight days after the victim was found).

Vetrano Jefferson testified that, one week before the victim's death, Banks struck him (Vetrano Jefferson) with a pistol *and threatened to kill him*.

Farr testified he, Banks, and Marcus Jefferson drove to Dallas so that Banks could reclaim his pistol to commit armed robberies and take care of any trouble that might arise during one.

As part of Banks' evidence, two witnesses testified in order to discredit Farr: *Kelley testified* he recently drove Farr to several doctors' offices to fill false prescriptions; and, a *former Arkansas police officer testified* Farr served as a paid informant in that State and was known to be unreliable.

Banks' parents and several acquaintances testified that Banks was a respectful, churchgoing young man.

And, *Banks testified*. Among other things, he stated it was his idea to obtain a gun so that Farr could commit an armed robbery. And, he admitted striking Vetrano Jefferson with a gun and threatening to kill him.

In October 1980, after the jury found the requisite special issues, the judge imposed the death penalty.

D.

In 1982, on direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence. ***Banks v. State***, 643 S.W.2d 129. The Supreme Court of the United States denied *certiorari* in 1983. ***Banks v. Texas***, 464 U.S. 904.

E.

Banks filed three state habeas petitions.

1.

Banks' first raised, *inter alia*, a jury discrimination claim based on ***Swain***, 380 U.S. 202, and a sufficiency of the evidence claim with regard to the second special sentencing issue – future dangerousness. After an evidentiary hearing, at which Banks offered no live testimony, the trial court recommended denial on the merits; the Court of Criminal Appeals accepted this recommendation. ***Ex parte Banks***, No. 13,568-01 (Tex. Crim. App. 1984) (unpublished).

2.

Banks' second petition, *inter alia*, again raised the sufficiency claim. After another evidentiary hearing, the petition was again rejected on the merits. ***Ex parte Banks***, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

3.

Banks' third petition presented, *inter alia*, each claim raised in this federal proceeding: ineffective-assistance; systematic exclusion of blacks; withholding material impeachment evidence on Cook and Farr; and insufficient evidence to support future dangerousness. The trial court did not conduct an evidentiary hearing and recommended denial.

The Court of Criminal Appeals remanded for an evidentiary hearing on the ***Swain*** and juror bias claims (the latter is not at issue). ***Ex parte Banks***, No. 13,568-03 (Tex. Crim. App. 3 Mar. 1993) (unpublished). Following the hearing, and concerning the ***Swain*** claim, the trial court concluded: the evidence established a *prima facie* case of discrimination; it was rebutted, however, by the State's non-discriminatory reasons for the strikes. The Court of Criminal Appeals denied relief, based on the trial court's findings and conclusions. ***Ex parte Banks***, No. 13,568-03 (Tex. Crim. App. 11 Jan. 1996) (unpublished).

F.

Banks filed his federal petition after contacting Farr and Cook. Farr revealed he had been a paid informant. And, Cook stated: significant portions of his testimony were false and given under pressure from authorities; Deputy Huff and others assured him that, in exchange for favorable testimony, a pending charge in Dallas County would be dismissed; and his testimony had been rehearsed on several occasions.

1.

On the basis of several affidavits, the magistrate judge granted Banks limited discovery and an evidentiary hearing on his ineffective-assistance, ***Brady***, and ***Swain*** claims.

As of the hearing, Farr resided in California and feared returning to Texarkana because of his poor health and prior informant activities. Therefore, Banks submitted Farr's affidavit. The State did not seek to depose Farr and limited its objection pursuant to ***Keeney v. Tamayo-Reyes***, 504 U.S. 1 (1992) (if failed to factually develop claim during state court proceedings, petitioner must establish cause and prejudice to be entitled to federal evidentiary hearing).

Farr's affidavit stated: he was paid $200 by Deputy Huff "to set Delma [Banks] up"; he convinced Banks that he (Farr) wanted a gun to rob a pharmacy for drugs; and it was Farr's idea to drive to Dallas to retrieve Banks' gun. At the federal hearing, Deputy Huff

confirmed that Farr had been a paid informant. And, Marcus Jefferson, who accompanied Banks and Farr to Dallas, testified Farr initiated conversations with Banks about securing a gun so that Farr could commit robberies.

Pursuant to the discovery order, the Bowie County District Attorney's office disclosed an undated, 74-page transcript of Cook's September 1980 pretrial interview, conducted by Bowie County law enforcement officers and prosecutors. (This transcript is the subject of a ***Brady*** claim COA request, discussed in part II.B.1.a.) At the evidentiary hearing, Assistant District Attorney (ADA) Elliot confirmed: at trial, his co-counsel, Raffaelli (the District Attorney during Banks' trial, who died prior to the evidentiary hearing), was in possession of the transcript and several pages of handwritten notes; prior to trial, they had *not* been disclosed to Banks. Only Cook's April 1980 statement, provided approximately two weeks after the murder, had been disclosed at the conclusion of Cook's trial testimony on re-direct.

Concerning the alleged deal for Cook's testimony (the subject of a ***Brady*** claim COA request, discussed in part II.B.1.b.), ADA Elliot testified: he did not arrange one, but it was possible Raffaelli did so without his knowledge; Deputy Huff and another investigator had contact with Dallas authorities that he (Elliot) was not privy to, but Deputy Huff had no authority to make a deal; and, following Banks' trial, he (Elliot) accompanied Deputy Huff

and Cook to Dallas and told an ADA there that, in a capital murder case, Cook gave helpful testimony for the prosecution. Deputy Huff similarly testified that, although he discussed the pending arson charges with Cook, he did not tell Cook that, in exchange for favorable testimony, they would be dismissed.

Cook's evidentiary hearing testimony sharply contradicted the State's. Cook claimed: when authorities arrived at his home on 24 April 1980, Deputy Huff threatened to charge him with being an accessory to murder if he failed to cooperate; he gave a statement (April 1980 statement) that was, in many respects, incomplete and untruthful; he was fearful of Deputy Huff throughout the investigation and trial and continued to fear him; a month prior to Banks' trial, habitual offender papers were filed in the pending case (arson) which would have significantly lengthened his (Cook's) maximum sentence; he understood Deputy Huff's remarks concerning cooperation to mean he needed to testify consistent with his April 1980 statement; while he was waiting to testify, Deputy Huff transported him to his wife's hotel to have conjugal visits (Cook's former wife gave consistent testimony); portions of his trial testimony were untruthful; and the day Deputy Huff and Elliot returned him to Dallas, the arson charges were dismissed.

Cook's sister, Carol Cook, testified: Deputy Huff threatened to "lock [her] brother up for the rest of his life" if she refused to testify at Banks' trial; Deputy Huff directed her to change her

testimony concerning the automobile she saw Banks driving during the 12 April weekend; although she was sure the automobile was *red*, Deputy Huff insisted it was *green*; and although she initially told the jury the automobile was *red*, she corrected herself and said it was *green*.

Regarding ineffective-assistance, witnesses testified concerning the time-of-death evidence, Cooksey's trial preparedness, and the defense function in capital trials.

Concerning time of death, although Fisher's trial testimony was that he heard what sounded like gunshots at 4:00 a.m. on Saturday, 12 April, his federal testimony was: he knew nothing about guns; the noises could have been firecrackers, car backfires, or rifle shots; and the noises could have occurred between 3:00 and 5:00 a.m. Dr. Riddick, a medical examiner for the State of Alabama, testified that several factors led him to conclude the victim died late on the evening of 12 April (Saturday) or early Sunday morning, 13 April. He conceded, however, that, consistent with the State's theory, including the effect of the weather, it was possible the victim was killed around 4:00 a.m. on Saturday, 12 April.

Concerning assistance of counsel, Banks' parents testified that, prior to trial, Cooksey met with them only briefly, with meetings lasting "no longer than 10 to 15 minutes". Mrs. Banks testified Cooksey asked her to testify Banks was at home with her

on Friday evening, 11 April; she refused. Although both parents had testified during the penalty phase, Cooksey had not spoken with them about the information he wanted communicated to the jury.

Kelley, who testified concerning Farr's bogus prescription scheme: was unaware that Cooksey planned to call him as a witness; had several drinks earlier on the morning of his trial testimony; and "was drunk" when he testified.

Vetrano Jefferson, who testified at trial for the State, testified: his fight with Banks he described at trial began because he (Jefferson) was drunk and was threatening his sister (Banks' common law wife); Banks defended her; Jefferson started the fight; and he never spoke with Banks' counsel, but would have been willing to do so.

Dr. Cunningham, an expert in forensic psychology, testified he conducted a thorough psychological evaluation of Banks (including nine hours with Banks, interviews with his family, and review of the trial transcript and his school, medical, and prison records) and concluded that, at the time of trial, there was little likelihood of additional acts of violence from Banks.

Goldstein testified Cooksey was ineffective in: pretrial investigation, cross-examination of State's witnesses, presentation of penalty phase witnesses, and failing to utilize a mental health expert.

In rebuttal, the State called Waters, hired by Cooksey as an investigator for Banks' trial. Waters testified he: interviewed a number of witnesses, but could not recall their names; visited and photographed the crime scene; and did *not* believe Banks' claim that he hitchhiked to Dallas, because, for example, Banks could not describe the vehicle he rode in.

2.

The magistrate judge recommended habeas relief be granted in part (sentence) and denied in part (conviction). The recommended relief was based on the State's failure to disclose Farr's paid informant status and ineffective-assistance at the penalty phase. ***Banks v. Johnson***, No. 5:96-CV-353 (E.D. Tex. 11 May 2000) (unpublished) (***Banks-USDC***).

3.

With minor modifications, the district court accepted the recommendations. ***Banks v. Johnson***, No. 5:96-CV-353 (E.D. Tex. 18 Aug. 2000) (unpublished) (***Banks-USDC II***). The district court later denied Banks' Rule 59 motion to modify the judgment. It also *denied* Banks a COA.

II.

Banks' third state habeas petition was denied approximately 15 years after his conviction. Because his federal petition was filed shortly before the 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), it is not applicable to the

claims for which habeas relief was granted. *See* ***Lindh v. Murphy***, 521 U.S. 320, 336-37 (1997). But, as discussed in part II. B., it is applicable to Banks' COA requests.

A.

Relief was granted on two bases: (1) information being withheld in violation of ***Brady***, 373 U.S. 83; and (2) ineffective-assistance at the penalty phase.

Under pre-AEDPA law, we "generally accord a presumption of correctness to any state court factual findings". ***Mann v. Scott***, 41 F.3d 968, 973 (5th Cir. 1994), *cert. denied*, 514 U.S. 1117 (1995). In addition, we "review the district court's findings of fact for clear error, but decide issues of law *de novo*". ***Id.***

1.

Relief was granted under ***Brady*** because the State failed to disclose Farr, a penalty phase witness, was a paid police informant. ***Banks-USDC***, at 44. This claim was not raised in either the first or second state petitions. In his third, Banks claimed the State violated ***Brady*** by failing to disclose "information that would have revealed ... Farr as a police informant and ... Banks' arrest as a 'set-up'". The trial court's denial recommendation did not specifically address this ***Brady*** claim; and the Court of Criminal Appeals, after remanding for an evidentiary hearing solely on Banks' unrelated ***Swain*** and juror bias claims, accepted the trial

court's recommendation and denied relief. ***Ex parte Banks***, No. 13,568-03 (Tex. Crim. App. 11 Jan. 1996) (unpublished).

To establish a ***Brady*** claim, Banks must prove: (1) the "evidence was suppressed"; (2) it "was favorable to the accused"; and (3) it "was material either to guilt or punishment". ***United States v. Ellender***, 947 F.2d 748, 756 (5th Cir. 1991). The district court ruled: the substance of Farr's penalty-phase testimony was that he, Banks, and Marcus Jefferson traveled to Dallas to retrieve Banks' gun so that Banks could commit armed robberies; and the purpose of that testimony was to demonstrate future dangerousness. ***Banks-USDC***, at 43-44.

In holding ***Brady*** had been violated, the district court relied on Deputy Huff's testimony at the federal hearing that Farr was a paid informant. ***Id***. at 43. Also in the record are two affidavits in which Farr admits being a paid informant.

The State maintains: that the affidavits and Farr's testimony are unexhausted, and the federal hearing at which Deputy Huff testified was improperly granted; and that, alternatively, the ***Brady*** claim fails on the merits.

a.

The procedural issues are: whether the federal hearing should not have been held; and whether the evidence relied on by the district court is unexhausted.

i.

The State contends Banks was not entitled to the hearing in the light of his failure, during the state proceedings, to develop the factual bases of his ***Brady*** claim. A petitioner is "entitled to [a federal] evidentiary hearing *if* he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure". ***Keeney***, 504 U.S. at 11 (emphasis added). An exception to this cause-and-prejudice requirement exists if a petitioner "can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing". ***Id***. at 12.

With regard to Banks' ***Brady*** claim, however, the order establishing the issues to be considered at the federal hearing never mentions either this cause-and-prejudice requirement or this miscarriage-of-justice exception. Nevertheless, the district court ordered the hearing based on Banks' offering proof that "he could not have had the information regarding this issue prior to any of his three state evidentiary hearings" because he asked the state court for aid in developing Cook's testimony, and the "state court never acted on [Banks'] request for assistance". In addition, the district court ruled Banks had "demonstrated ... he did not have a full and fair opportunity to present his evidence on [the ***Brady***] issue to the state court, primarily because [Farr and

Deputy Huff] did not come forward until *after* the state court evidentiary hearings". (Emphasis added.)

Concerning the witnesses' not coming forward, the State contends there was no evidence this was due to its interference. *See* ***Johnson v. Puckett***, 176 F.3d 809, 816 (5th Cir. 1999) ("a showing of 'interference by officials' is sufficient to show cause for a procedural default"). The State next contends that the state courts did not prevent Banks from developing the ***Brady*** claim. Instead, according to the State, there is nothing in the record that demonstrates Banks was prevented from exploring this issue during the state habeas proceedings. As for the district court's observation that the state courts did not respond to Banks' request for investigative-assistance, the State contends such requests were limited to assistance to investigate whether there had been a failure to disclose ***Brady*** information *regarding Cook, not Farr*.

Banks does not specifically address the challenge to holding a federal evidentiary hearing. Instead, he responds to the exhaustion contention, discussed *infra*.

As for no evidence being presented at the state evidentiary hearing because the state court never acted on Banks' request for assistance, Banks' request was limited, as acknowledged by the district court, to "investigative assistance *regarding Cook's testimony*", not Farr's. (Emphasis added.) Banks had stated he "need[ed] the aid of an investigator in order to develop fully his

allegation that the Bowie County District Attorney's office had not disclosed that a favorable deal had been arranged for ... *Cook*, the State's chief witness, in exchange for his testimony...." (Emphasis added.) (Again, this alleged deal is the subject of a ***Brady*** claim COA request, discussed in part II.B.1.b.)

Obviously, the state court's refusal concerning Cook is of no relevance to the ***Brady*** claim regarding Farr. Accordingly, not being provided investigative assistance is not cause for not developing this ***Brady*** issue in state court, in the light of Banks' never asking for assistance *with regard to Farr*.

As for witnesses not coming forward until after the state court evidentiary hearing, Banks has not demonstrated that he attempted, even if unsuccessfully, to explore this issue, or any other issue, with those witnesses. Farr states in one of his affidavits: "I would not have revealed the information in this declaration to [Banks' representatives], or to anyone else, before I elected to do so *in the fall of 1996*". (Emphasis added; Banks' third – and final – state habeas request was denied much earlier, in January 1996.) Even accepting Farr's statement as true, it does not justify Banks' not attempting to speak with Farr prior to the conclusion of the (three) State habeas proceedings.

Accordingly, Banks has not shown cause for not attempting in state court to factually develop this ***Brady*** issue. In addition, neither the district court nor Banks in this appeal attempts to

demonstrate the applicability of the fundamental-miscarriage-of-justice exception. Accordingly, the district court erroneously granted an evidentiary hearing regarding this ***Brady*** issue.

As a result, habeas relief cannot be granted based on the evidence presented at the federal hearing: Deputy Huff's testimony that Banks was a paid informant. ***Banks-USDC***, at 42-44. The district court's holding, however, is predicated upon that testimony. Without it, the ***Brady*** claim must fail. It is true that, in Farr's affidavits presented to the district court, he admits his paid informant status. But, for the reasons stated *infra*, that evidence is not exhausted and, as a result, cannot establish a ***Brady*** claim.

ii.

Assuming *arguendo* the evidentiary hearing was granted properly for this ***Brady*** claim, next at issue is the State's contention that Deputy Huff's testimony, as well as Farr's above-referenced affidavits, were not exhausted. As a prerequisite to federal habeas relief, a petitioner must exhaust "the remedies available in the courts of the State". 28 U.S.C. § 2254(b) (1994). Such remedies are not exhausted where the petitioner "presents material additional evidentiary support to the federal court that was not presented to the state court". ***Graham v. Johnson***, 94 F.3d 958, 968 (5th Cir. 1996). "[N]ew factual allegations in support of a previously asserted legal theory" must also be exhausted, even

though such "factual allegations came into existence after state habeas relief had been denied". ***Joyner v. King***, 786 F.2d 1317, 1320 (5th Cir.), *cert. denied*, 479 U.S. 1010 (1986). "There is, however, a 'cause and prejudice' exception to the bar for failure to exhaust." ***Beazley v. Johnson***, 242 F.3d 248, 264 (5th Cir.), *cert. denied*, 122 S. Ct. 329 (2001).

Again, Banks' third (final) state petition was denied in January 1996. Neither of Farr's affidavits – dated 4 November 1996 and 21 May 1999 – was presented in state court. A district court should not consider an affidavit that was not offered to the state court where no cause for failure to exhaust has been shown. ***Woods v. Johnson***, 75 F.3d 1017, 1029 n.16 (5th Cir.), *cert. denied*, 519 U.S. 854 (1996); *see* ***Hogue v. Johnson***, 131 F.3d 466, 505 (5th Cir. 1997) (holding federal court should not consider affidavits not presented to state court), *cert. denied*, 523 U.S. 1014 (1998).

As for cause, in his brief here, Banks contends:

> *[Banks] pleaded that Farr was an informant in his third state habeas proceeding.* Candor required the state to respond truthfully and admit his true status. Instead, [the attorney] who was then representing the state's interest, *ignored the claim and made no response.* It was only after this matter was filed in federal court that ... Banks located and gained access to ... Farr, who for the first time revealed his informant status in this matter.

(Emphasis added.) In this light, it is clear that, at the time of Banks' third state habeas proceeding, he *believed* Farr had been a

paid informant. Nevertheless, Banks offers no reason why he did not attempt to locate Farr and ascertain his true status. If Banks had sought Farr's testimony, and Farr had been uncooperative, then, arguably, Banks would have shown cause. Instead, because it appears he made no such effort, the "cause" for Banks' failure to obtain Farr's information was Banks' lack of diligence.

Along this line, Banks maintains the State should have responded to his state habeas Farr-was-an-informant contention. But, when the State did not respond, this should have prompted him to further investigate this claim, *i.e.*, speak with Farr, rather than do nothing.

Concerning Deputy Huff's federal testimony that Farr was a paid informant, and as for cause, Banks contends: "[I]t was only because of the [federal] ... hearing that [he] had the opportunity to put [the State's attorney] and [Deputy] Huff under oath and directly inquire about ... Farr's true status". This does not demonstrate cause. As of his third state petition, Banks believed Farr had been an informant. Accordingly, Banks should have at least attempted to interview the investigating officers, such as Deputy Huff, to ascertain Farr's status.

Therefore, neither Farr's affidavits nor Deputy Huff's testimony are exhausted, and Banks has not shown cause for his failure to do so. Federalism concerns demand that state courts be given an opportunity to consider a claim on the same evidence as do

federal courts. Because this evidence is procedurally barred, and is the only evidence Banks offers in support of this ***Brady*** claim, it fails.

b.

Assuming both that the federal hearing concerning this claim was proper and that the evidence was exhausted, at issue are the merits of the ***Brady*** claim. Again, Banks must satisfy each of ***Brady's*** three prongs: the State withheld evidence; it was favorable to him; and it was material. *See* ***Ellender***, 947 F.2d at 756.

i.

The State maintains Banks has not presented evidence that it withheld Farr's status. Noticeably absent from the record, according to the State, is any statement from Banks' trial counsel (Cooksey) that he did not know Farr's status. The State raised this issue in district court, asserting in its summary judgment motion: "defense counsel [Cooksey] was obviously aware of evidence that Farr was a police informant"; and "Banks has failed to allege or prove exactly what evidence the prosecution purportedly knew about that the defense did not". The district court disagreed: "At no time did the State correct Farr's erroneous [trial] testimony [that he was not paid for his testimony] or announce Farr's paid informant status". ***Banks-USDC***, at 44.

Banks responds that the evidence does demonstrate Farr's informant identity was never provided to him. According to Banks: "Although the ***Brady*** doctrine required the trial prosecutors to formally advise counsel of Farr's status, there is no pleading or oral reference to Farr's status as an informant anywhere in the trial record".

Banks also asserts that, at the pre-indictment examining trial, Deputy Huff refused to disclose the informant's identity. And, at trial, when Banks' counsel asked Farr whether he was paid for his testimony, Farr denied he was. According to Banks, given his counsel's strategy to discredit Farr, had he known he was a paid informant, he surely would have challenged Farr's response. Finally, Banks points to Deputy Huff's inquiry to Banks' counsel at the federal hearing on whether it was permissible to identify Farr as an informant:

> Q. In this particular case, you received the aid from an informant, did you not?
>
> A Yes, sir.
>
> Q And who was that?
>
> A His name is Robert Farr. I don't know if it's procedurally regular -
>
> Q We've inquired. Mr. Farr has no problem with revealing his identity.
>
> A Robert Farr.

The State responds that it had no duty to disclose Farr's informant status or that he was paid; and that Banks was not diligent in seeking disclosure.

In the light of Banks' failure to exhaust the evidence supporting this ***Brady*** claim, as well as our holding, *infra*, that Farr's status was not material to the jury's penalty phase finding, we need not decide whether the State had a duty to disclose Farr was a paid informant and, if so, whether it did so. Instead, we will *assume* this information was *withheld*.

ii.

At issue, therefore, is whether the withheld evidence was favorable to Banks. In the report and recommendation, the magistrate judge stated that Farr testified that he, Banks, and Marcus Jefferson "traveled to Dallas to retrieve [Banks'] gun so that *Banks* could commit several armed robberies". ***Banks-USDC***, at 43-44 (emphasis added). The State notes Farr instead testified: "*We* were going to pull some robberies on the way back [to Texarkana]". (Emphasis added.)

Farr states in his affidavits that he never intended to commit an armed robbery; that he only told Banks that so that he would retrieve Banks' gun. According to the State, the jury

> was presented with a scenario in which two people were acting together for an illegal purpose. It would hardly be favorable to Banks' case for the jury to be told that Farr only made up the story about the robbery so that Banks would ... get his gun. This set of

> facts would have had only one of the two men - Banks - believing the gun would be used in an armed robbery.

Banks does not respond to this contention, focusing instead on the third ***Brady*** prong — materiality. In any event, the State's contention misses the mark. The withheld evidence was Farr's paid informant status. Such information, obviously, has a bearing on his credibility; Farr's being a paid informant would certainly be favorable to Banks in attacking Farr's testimony. Accordingly, Banks has satisfied the second ***Brady*** prong.

iii.

For the final ***Brady*** prong, evidence is

> *material* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Ellender, 947 F.2d at 756 (emphasis added; internal quotation marks omitted). The State contends Farr's status is not material because his testimony was corroborated by other witnesses and the information's impeachment value would have been cumulative.

During the penalty phase, Farr testified that he, Banks, and Marcus Jefferson traveled to Dallas to "pick up a pistol". When they arrived at Cook's house, Banks went to the front porch and returned with a gun that was not his, stating Cook had given his (Banks') gun to a woman in west Dallas. As stated, concerning

their intent, Farr testified: "We were going to pull some robberies on the way back [to Texarkana]".

According to the State, Marcus Jefferson's guilt phase testimony was consistent with Farr's. Jefferson testified: when he, Farr and Banks reached Dallas, they drove around looking for a house; when they reached it, Banks went to the front porch, returned with a pistol, and stated that the person who had given him that pistol, Cook, did not have his (Banks') gun because he had given it to someone else.

The State also relies on Cook's trial testimony: while Banks was staying in his house one day after the murder, he (Cook) took Banks' gun and sold it; Banks later came to his house and told him he needed a pistol; and Banks asked him where his (Banks') was.

The State also contends that Banks' own trial testimony corroborates many of Farr's statements. During the penalty phase, Banks testified: Farr planned to commit "some robberies"; and it was his (Banks') idea "to go get the gun". On cross-examination, Banks testified that, when he arrived at Cook's house, Cook did not have Banks' gun and gave him (Banks) another. Ultimately, Banks *admitted* he was "going to supply [Farr] the means and possible death weapon in an armed robbery".

In its second contention concerning materiality, the State maintains that the impeachment value of Farr's paid informant status is low because of other impeachment evidence used against

him. During Farr's penalty phase cross-examination, he denied: (1) going to Arkansas the previous week to obtain false prescriptions and getting into an altercation with a doctor who refused to provide him with one; (2) being a "snitch" for Owens, an Arkansas narcotics officer; and (3) that his wife shot him.

During the penalty phase, however, defense witness Kelly contradicted Farr's denial of an altercation with a doctor in Arkansas. According to Kelly, when he went into the hospital where Farr was located, the doctor and Farr were "fussing" and the doctor told Farr "to get his ass out of there". Kelly also testified that, after unsuccessfully attempting to obtain prescription drugs from other hospitals in Arkansas, Farr stated "he was going to get what he was after [prescription drugs] before we got back to Texarkana".

The above-referenced Arkansas officer, Owens, testified for the defense at the penalty phase and contradicted Farr's assertion that he never was an informant for him and that he had not been shot by his (Farr's) wife. Owens testified he had used Farr as an informant once or twice and that, because his "information was not correct", he no longer used him.

Banks does not respond to these assertions by the State. Instead, Banks' argument is two-fold. First, he contends:

> As the state had little other evidence to demonstrate that [he] would be a danger in the future, the result at the penalty phase likely would have been different had the jury known

that Farr had every reason to testify as he did to protect his business relationship with law enforcement and to avoid prosecution.

Second, Banks maintains that, because the prosecution failed to correct Farr's untruthful testimony during the guilt phase, the standard for materiality is less onerous. The referenced testimony occurred when, on questioning by Banks' attorney, Farr denied "ever tak[ing] any money from some police officers".

For this second contention, Banks relies upon ***Kirkpatrick v. Whitley***, 992 F.2d 491, 497 (5th Cir. 1993), which held that, "if the prosecutor has knowingly used perjured testimony or false evidence, the standard is considerably less onerous: the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict'". (Quoting ***United States v. Bagley***, 478 U.S. 667, 679 n.9 (1985) (citing ***Napue v. Illinois***, 360 U.S. 264, 269 (1959) (Fourteenth Amendment violation if "the State, although not soliciting false evidence, allows it to go uncorrected when it appears"))); ***see also Giglio v. United States***, 405 U.S. 150, 153-55 (applying ***Napue*** standard where the Government did not correct a witness' false testimony concerning an agreement not to prosecute in exchange for his testimony).

Kirkpatrick, however, does not hold that the ***Brady*** materiality standard is lessened because of false testimony. Instead, ***Kirkland*** delineates the ***Brady*** materiality standard from that for a

Giglio/Napue claim. 992 F.2d at 497 ("We observe that different standards of materiality apply to ***Brady*** claims and claims that the prosecution has knowingly used perjured testimony or false evidence."). In short, ***Kirkpatrick*** makes clear that a ***Brady*** claim and a ***Giglio/Napue*** claim are separate and distinct. *E.g.*, ***Barrientes v. Johnson***, 221 F.3d 741, 752-53 (5th Cir. 2000) (analyzing ***Brady*** claim separately from ***Giglio*** claim), cert. *dismissed*, 531 U.S. 1134 (2001). Accordingly, whether the prosecution failed to correct Farr's testimony is irrelevant to Banks' ***Brady*** claim and its materiality standard.

To the extent Banks attempts to establish a ***Giglio/Napue*** claim, the State maintains it must fail for several reasons: Banks never raised it in his federal petition; the district court did not grant relief based on it; and, even if Banks had presented it, it should be denied on the merits.

No ***Giglio/Napue*** claim is presented in Banks' federal petition. He does, however, make such an assertion in his federal post-hearing brief and in his proposed findings and conclusions. We need not decide whether Banks sufficiently raised this claim; the district court granted relief under ***Brady***, not ***Giglio/Napue***. It did recognize that, at "no time did the State correct Farr's erroneous testimony or announce Farr's paid informant status"; it

granted relief, however, on the basis of *withheld* impeachment evidence. ***Banks-USDC***, at 44.

Assuming Banks raised a ***Giglio/Napue*** claim in district court, we cannot consider it, because Banks does not seek a COA based on the district court's not granting relief on this basis. Furthermore, again assuming the federal petition included a ***Giglio/Napue*** claim, Banks' first and second state habeas petitions did not. In his third petition, while he does cite ***Giglio***, he does so only in connection with the ***Brady*** claim *concerning Cook, not Robert Farr*:

> As extensively detailed elsewhere in this Petition, the prosecutors concealed promises of leniency and favorable treatment made to key State's witness Cook. Had this evidence been disclosed to the defense, as required by ***Giglio v. United States***, 405 U.S. 150 (1972), and ***Brady v. Maryland***, 373 U.S. 83 (1963), the jury likely would have rejected Cook's testimony and acquitted Mr. Banks.

In contrast, in Banks' third state petition, in the section presenting his ***Brady*** claim concerning *Farr's* paid informant status, there is no mention of a ***Giglio/Napue*** violation.

> To exhaust, a petitioner must have fairly presented the substance of his claim to the state courts. It is not enough that all the facts necessary to support the federal claim were before the state courts.... Indeed, where petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement.

Wilder v. Cockrell, 274 F.3d 255, 259 (5th Cir. 2001) (internal quotation marks and citations omitted).

Accordingly, because Banks seeks relief on a legal theory distinct from that relied on in state court, any ***Giglio/Napue*** claim is unexhausted. Therefore, under the materiality standard for ***Brady***, *not* ***Giglio/Napue***, we must determine whether there is a reasonable probability that, had the jury been informed of Farr's status, it would not have assessed the death penalty.

As detailed above, much of Farr's penalty phase testimony was corroborated, even by Banks. Obviously, although such testimony was crucial to the State's position on future dangerousness, Farr's paid informant status would not have *directly* contradicted his testimony regarding Banks' intent. Instead, evidence of his true status would only have directly impeached his testimony that he was not an informant.

Furthermore, even assuming it was not Banks' intent to actually participate in the planned robberies, it was certainly his intent to provide Farr with a weapon to do so. Neither Farr's affidavits nor Deputy Huff's testimony disputes this.

And, to the extent Farr's informant status would have been useful as other impeachment evidence, Farr had already been impeached on three bases: that he did not get into an altercation regarding false prescriptions; that he was not an informant for

Arkansas law enforcement; and that he had not been shot by his wife.

Accordingly, Farr's paid informant status, when considered against the other impeachment evidence about him, and the fact that much of his testimony concerning the trip to Dallas to retrieve Banks' pistol was corroborated, does *not* present a reasonable probability that the jury would have found differently concerning Banks' future dangerousness. *See* ***Drew v. Collins***, 964 F.2d 411, 419 (5th Cir. 1992) (holding evidence of an "incremental impeachment value" not material), *cert. denied*, 509 U.S. 925 (1993). Therefore, the district court erroneously granted relief based on ***Brady***.

2.

Relief was also granted on Banks' ineffective-assistance claim for the penalty phase. He did not raise it in his first state petition; in his second, he claimed only *appellate counsel* was ineffective. In his third state petition, however, he claimed *trial counsel* was ineffective for both phases. In recommending denial, the state trial court stated: Banks received effective assistance at all trial stages; and counsel adequately and effectively investigated "matters relevant to both the guilt/innocence and punishment phases". Again, after remanding for an evidentiary hearing concerning Banks' ***Swain*** and juror bias claims, the Court of Criminal Appeals accepted the trial court's

recommendation and denied habeas relief. ***Ex parte Banks***, No. 13,568-03 (Tex. Crim. App. 11 Jan. 1996) (unpublished).

To prevail on ineffective-assistance, Banks must prove deficient-performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Performance is deficient when the representation falls "below an objective standard of reasonableness". ***Id***. at 688.

Prejudice occurs if counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable". ***Id***. at 687. Accordingly, Banks must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". ***Id***. at 694. "When a defendant *challenges a death sentence* ..., the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death". ***Id***. at 695 (emphasis added).

The district court held counsel's performance "deficient [because he] fail[ed] to investigate or prepare for the punishment phase, despite ... available mitigating evidence relating to Banks's background" and "fail[ed] to interview or prepare the witnesses he ... called and examined" at that phase. ***Banks-USDC***, at 24. Concerning prejudice, the court held there was "a reasonable probability that[,] but for the errors and omissions of

trial counsel at the punishment phase, *combined with the State's failure to disclose Farr as a paid informant*, the outcome of Banks's punishment phase would have been different". *Id.* at 24-25 (emphasis added; cumulation of error discussed *infra*).

The district court first found deficient-performance because counsel did not "attempt[] to obtain a social history from Banks or his family". *Id.* at 22. In addition, it found: counsel never questioned Banks' parents about his childhood; never informed them they would be called to testify at the penalty phase; and waited until the guilty verdict was returned to instruct Banks' mother to "gather witnesses for the punishment phase, which began the following day". *Id.*

The district court also based deficient-performance on Dr. Cunningham's testimony at the federal hearing; the court stated: "Banks's father abused alcohol and subjected Banks to repeated incidents of brutality and harsh discipline"; as a child, "Banks witnessed many episodes of cruelty directed at his mother"; and "Banks ... had no history of violence or alcohol abuse and seemed to possess a self-control that would suggest no particular risk of future violence". *Id.* at 23. According to the district court, counsel never explored any of these issues and never presented this evidence to the jury. *Id.*

The district court also found that, prior to trial, counsel made no attempt to interview Vetrano Jefferson, the State witness.

Id. at 22. As noted, he was the second of the two penalty phase witnesses used to establish future dangerousness; he testified Banks had hit him with a gun *and threatened to kill him.*

According to the district court, if counsel had interviewed Vetrano Jefferson, he would have known that

> Jefferson, not Banks, was the aggressor in the fight between the two men which occurred the proceeding April [the month of the murder]. The trial testimony of Jefferson and the prosecutor's argument left the clear impression that Banks was the aggressor.

Id. at 23.

a.

First at issue is whether counsel was ineffective for failing to obtain Banks' social history and to investigate mitigating psychological evidence.

i.

The two failures are related. Obviously, to determine whether expert assistance was needed, counsel needed to know the circumstances of Banks' past. For example, was he abused; did he have mental deficiencies? Failure to ask these and similar questions of his parents and others, a failure the State does not dispute, falls below an objective standard of reasonableness. Banks has demonstrated deficient-performance.

ii.

Regarding prejudice, in his brief here, Banks relies on Dr. Cunningham's testimony:

> Dr. Cunningham's testimony showed that [Banks' father's] chronic abuse of alcohol nearly tore his family apart, caused ... Banks to endure repeated incidents of undeserved brutality and harsh discipline, and to witness many instances of extreme cruelty directed at his mother and siblings.

Dr. Cunningham testified: (1) Banks was physically and mentally abused by his father; (2) he witnessed his father's abuse of his mother; (3) his father discharged firearms in the house; (4) his father was an alcoholic; (5) Banks had a learning disability; (6) he suffered from a chronic skin disease; and (7) there was a low risk Banks would commit future acts of violence.

The State maintains Dr. Cunningham's testimony is not exhausted, because it was not presented in the state proceedings. There, Banks submitted the affidavits of Dr. Pina, which stated: his observations indicated Banks suffered brain damage; and, ultimately, Banks did "not understand much of what was happening at his trial, [and] he also did not understand much of what his lawyer was saying". In his amended affidavit, Dr. Pina discussed, *inter alia*, Banks' skin condition and his conclusion that Banks was "beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped". He also stated that "some of the[] features of ... Banks' psychological profile accurately would have predicted that he would prove a 'safe,' nonviolent inmate during his present incarceration".

Banks does not address the exhaustion issue. He also stated that "some of the[] features of ... Banks' psychological profile accurately would have predicted that he would prove a 'safe,' nonviolent inmate during his present incarceration".

He fails to show cause for not presenting Dr. Cunningham's testimony to the state courts. This testimony is not exhausted; it is a significant expansion of the facts and opinions presented in state court through Dr. Pina's affidavits. *See* ***Beazley***, 242 F.3d at 264. Accordingly, the only exhausted evidence for this claim is through Dr. Pina's affidavits.

As discussed *supra*, those affidavits addressed, *inter alia*, Banks' father's "beating" and "terrorizing" him, including the tying-whipping incident. Dr. Pina concluded: "[These] experiences alone would be enough to account for a large part of Mr. Banks' psychological impairment". As for Banks' skin condition, Dr. Pina concluded: "[This] illness, compounding the trouble in his parents' marriage from his father's alcoholism, impaired the development of normal and supportive bonding relationships between [Banks] and his mother and father". Accordingly, Dr. Pina concluded:

> Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore. He understandably went to great lengths to hide himself from public view throughout life.... His fears of rejection, confirmed by his classmates, only led to lower self esteem.

This psychological information, while possibly mitigating, does *not* present a reasonable probability that, had the jury been presented with it, it would have not assessed the death penalty. In other words, in the light of the nature of the murder, Banks' intent soon thereafter to retrieve a weapon to be used in future armed robberies, and Banks' continued denial during the penalty phase that he committed the murder, there is not a reasonable probability that this evidence would have changed the outcome of the penalty phase. Accordingly, the district court erred in granting relief on this basis.

b.

Next at issue is whether counsel was ineffective in failing to prepare penalty phase witnesses – in particular, Banks' parents – to testify.

i.

Regarding deficient-performance, the State does not dispute the finding that Banks' counsel never attempted to prepare Banks' parents or any of the other defense witnesses offered during the penalty phase. We will assume deficient-performance.

ii.

Regarding prejudice, Banks' father testified at the federal hearing that he had a drinking problem in his "younger days" and "used to get drunk every weekend". When asked "what would you have wanted to tell the jury about your son when they were going to go

back and decide the sentence in this case", Banks' father responded: "I would've just [told] them to spare his life, because I know I raised him real nice. He couldn't [have done anything] like that. I still say that". In an affidavit submitted in the state habeas proceedings, Banks' father stated that, when Banks was in elementary school, he tied him to a tree and "whipped him with a leather belt or strap" to discipline him for tricking other students out of their lunch money.

Banks' mother testified at the federal evidentiary hearing: Banks suffered from a skin disorder, as well as an inferiority complex; and her husband had a drinking problem while Banks was growing up. She testified during state habeas proceedings that her husband "would get drunk and he would get angry and holler at me".

Accordingly, at issue is whether, had Banks' counsel prepared Banks' parents to testify to the above described events (including: (1) the father's drinking; (2) the tying-whipping incident; and (3) the skin disorder), there is a reasonable probability the jury would not have assessed the death penalty. There is not a reasonable probability that, had the jury been presented with this information, it would not have assessed the death penalty. Therefore, the district court erred in granting relief on this basis.

As for the failure to prepare other penalty phase witnesses, the district court pointed to Kelly's being intoxicated on the

morning he testified at Banks' trial and Banks' counsel's "speaking with Kelly for no more than one minute prior to testifying". ***Banks-USDC***, at 22. The district court did not specify, nor does Banks, what Kelly's testimony would have been had counsel prepared him. (In fact, Kelly's testimony was quite helpful to Banks; it impeached Farr's testimony concerning his attempts to illegally obtain prescription drugs.) Likewise, for his other penalty phase witnesses, Banks does not state what their testimony would have been had they been prepared. Accordingly, there is not a reasonable probability that, had counsel prepared them, the jury would not have sentenced Banks to death. Again, the district court erred in granting relief on this basis.

c.

Next at issue is whether Banks' counsel was ineffective for failing to interview Vetrano Jefferson.

i.

Concerning deficient-performance, the State does not dispute that Banks' counsel never interviewed Jefferson, one of only two penalty phase witnesses offered by the State. This failure falls below an objective standard of reasonableness. Counsel's performance was deficient.

ii.

Again, in holding there was prejudice, the district court determined that, based on Jefferson's testimony at the evidentiary

hearing, had Banks' counsel interviewed him, counsel "would have known that Jefferson, not Banks, was the *aggressor* in the fight between the two men.... The trial testimony of Jefferson ... left the clear impression that Banks was the aggressor". ***Banks-USDC***, at 23 (emphasis added). The State maintains: that Jefferson's testimony at the federal hearing is unexhausted; and that, alternatively, no prejudice resulted from the failure to interview.

(a)

The State asserts, and Banks does not dispute, that Vetrano Jefferson's post-trial testimony was never presented during the state habeas proceedings. (The State points out that the unsigned affidavit of Demetra Jefferson, (Vetrano Jefferson's sister and the mother of Banks' children) was presented during those proceedings. The district court apparently did not rely on that affidavit, and Banks does not contend that we should consider it in determining exhaustion *vel non*.)

Banks does not address exhaustion, much less show cause for why, in the state proceedings, he did not present Jefferson's current version of the events. Accordingly, his testimony is unexhausted; without it, Banks has not shown a reasonable probability that the outcome of the penalty phase would have been different, as there is no evidence to contradict Jefferson's trial testimony.

(b)

Even assuming exhaustion, Banks has not shown prejudice. At the penalty phase, Banks *admitted* he hit Jefferson with a gun and *threatened to kill him*.

Although, at trial, Jefferson testified that Banks did so, he gave no background regarding the altercation. Jefferson provided that aspect at the federal hearing:

> I was drunk one day I came over and I was threatening my sister and he [Banks] defended her. And when he told me to leave her alone, I told him I'll whoop his ass. So we got into a fight. And he got a gun and hit me in the face with it.

Jefferson testified that he started the fight.

The only difference between Jefferson's trial and federal hearing testimony is his stating Banks hit and threatened to kill him *in response* to his "threatening" his (Jefferson's) sister and telling Banks that he would "whoop his ass". Thus, at issue is whether, based on this information, there is a reasonable probability the jury would not have answered the future dangerousness issue as it did.

Needless to say, Banks' *assaulting and threatening to kill Jefferson* is far from a proportional response to verbal threats of a non-lethal nature. Based on Banks' violent response, coupled with Farr's testimony about Banks' post-murder intent to commit, or at least assist in, armed robberies, had the jury been presented with Jefferson's federal testimony, there is not a reasonable

probability it would not have found future dangerousness. Accordingly, the district court erred in granting relief on this basis.

3.

As stated, relief should not have been granted on the basis of either ineffective-assistance or ***Brady*** error. But, the magistrate judge seems to have grounded her recommendations with respect to both claims on cumulative error.

For the ***Brady*** claim, the magistrate judge recommended that the withheld information was material because

> the State's failure to disclose Farr's informant status, *coupled with trial counsel's dismal performance during the punishment phase*, undermined the reliability of the jury's verdict regarding punishment. There is a reasonable probability that[,] *but for the foregoing*, the results of the punishment phase of the trial would have been different.

Banks-USDC, at 44 (emphasis added).

For the ineffective-assistance claim, regarding prejudice, the magistrate judge stated:

> This is not a case where the evidence presented by the State compels the conclusion that the specific evidence offered by Banks would not have made any difference in the outcome with respect to punishment. There is a reasonable probability that[,] but for the errors and omissions of trial counsel at the punishment phase, *combined with the State's failure to disclose Farr as a paid informant*,

> the outcome of Banks' punishment phase would have been different.

Banks-USDC, at 24-25 (emphasis added).

The State objected to the report and recommendation on the basis that the cumulative error doctrine had been improperly invoked. The district judge overruled the objection, holding that the magistrate judge "separately considered and analyzed" the ***Brady*** and ineffective-assistance claims. ***Banks-USDCII***, at 5. The district judge also overruled the objection on the basis that the two claims are interrelated, because Banks "contend[ed] that the State failed to produce, and his counsel, due to inadequate preparation, contrary to ***Strickland***, failed to discover, substantial evidence regarding Farr's status". ***Id***. Ultimately, the district judge noted that

> federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors so infected the entire trial that the resulting conviction violates due process.

Id. at 5-6 (quoting ***Derden v. McNeel***, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc), *cert. denied*, 508 U.S. 960 (1993)).

The magistrate judge did separately address the claims; but, each holding included the other as the basis of materiality or prejudice. The district judge was also incorrect that the claims

were interrelated. In discussing ineffective-assistance, the magistrate judge stated:

> The State had a clear duty to correct Farr's untruthful testimony and failed to do so. *While trial counsel cannot be faulted for failing to object on this basis*, Farr's inaccurate testimony *compounded* the otherwise inadequate efforts of trial counsel during the punishment phase of the trial.

Banks-USDC, at 24 (emphasis added). Although this statement attempts to link the two claims through cumulative error, it is not a conclusion that the ***Brady*** claim is related to deficient-performance.

Instead, it is the opposite. In fact, in his brief, Banks makes clear he does not claim counsel was ineffective regarding the ***Brady*** claim: "[Trial counsel's] failure to impeach ... Farr's most damaging sentencing testimony ... cannot be laid at his feet". Accordingly, contrary to the district court's holding that the claimed errors were related, the magistrate judge's recommendation was instead based upon cumulative error.

a.

Banks, however, did not claim cumulative error in his federal petition, with the exception of asserting that the "cumulative effect of the *prosecutors'* multifarious violations ... [denied him] a fundamentally fair trial". (Emphasis added.) Furthermore, he did not claim cumulative error in any of his three state petitions.

Accordingly the district court's cumulative error holding is based on an unexhausted claim.

b.

Assuming this claim is exhausted *and* was raised in the district court, the cumulative error holding fails on the merits.

Such error is predicated upon the theory that, although certain errors, considered individually, do not mandate relief, those errors, when considered in the aggregate, do. *See* ***United States v. Sepulveda***, 15 F.3d 1161, 1195-96 (5th Cir. 1993) ("Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect".), *cert. denied*, 512 U.S. 1223 (1994).

It goes without saying that, for there to be cumulative error, there must first be error. Likewise, where there is no error, there is nothing to cumulate. *See, e.g.*, ***Yohey v. Collins***, 985 F.2d 222, 229 (5th Cir. 1993). Banks has not established error either under ***Brady*** or for ineffective-assistance. Therefore, relief cannot be based on cumulative error.

B.

Notwithstanding that Banks filed pre-AEDPA for federal relief, he must obtain a COA, *pursuant to AEDPA*, in order to appeal a denied claim. *See* ***Green v. Johnson***, 116 F.3d 1115, 1120 (5th Cir. 1997); 28 U.S.C. § 2253(c)(1)(A). To receive a COA, he must make "a *substantial* showing of the denial of a constitutional right".

28 U.S.C. § 2253(c)(2) (emphasis added); *see also* ***Barefoot v. Estelle***, 463 U.S. 880, 893 (1983). He must demonstrate: the issues are subject to debate among reasonable jurists; or a court could resolve the issues in a different manner; or the questions presented are worthy of encouragement to proceed further. ***Slack v. McDaniel***, 529 U.S. 473, 483 (2000); ***Estelle***, 463 U.S. at 893 n.4.

For claims denied on *constitutional grounds*, Banks must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong". ***Slack***, 529 U.S. at 484. For those denied on *procedural grounds*, Banks must show "jurists of reason would find it debatable whether the petition states a *valid claim* of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its *procedural* ruling". ***Id.*** (emphasis added).

The claims for which he seeks a COA are: ***Brady***; ineffective-assistance at the guilt phase; ***Swain***; and sufficiency of the evidence.

1.

Banks' two ***Brady*** claims concern Cook: suppression of the earlier-described transcript (the 74-page transcript of the prosecution's pretrial, September 1980 interview of Cook (as

opposed to his April 1980 statement)); and suppression of the earlier-described alleged deal for his testimony.

a.

The district court *refused to consider* the ***Brady*** claim concerning the transcript. The State maintains Banks never raised this issue in his petition; instead, he included the allegations in his proposed federal findings and conclusions, in his objection to the report and recommendation, and in his Rule 59 motion. That motion to amend the judgment to discuss this claim was denied. Such denial is reviewed for an abuse of discretion. ***Martinez v. Johnson***, 104 F.3d 769, 771 & n.3 (5th Cir.), *cert. denied*, 522 U.S. 875 (1997). Consequently, Banks must show jurists of reason would find it debatable whether the court abused its discretion.

Banks insists he pleaded the issue sufficiently by stating prosecutors "knowingly failed to turn over exculpatory evidence as required by ***Brady***", mentioning Cook and Farr in that same paragraph. Further, Banks contends the State acknowledged ***Brady*** materials include impeachment evidence.

The State responds that the ***Brady*** claim in Banks' petition focused entirely on suppression of evidence concerning another murder suspect; linking "Cook to Robert Farr and to Texarkana generally"; revealing Farr's status as a police informant; and exposing Cook's motivation to testify favorably for the State to avoid prosecution on the unrelated arson charge that could have

resulted in his receiving a life sentence (this different ***Brady*** claim is discussed *infra*). The State further asserts Banks should have sought leave to amend his petition under Federal Rule of Civil Procedure 15 because issues first raised in objections to a report and recommendation are not properly before the district court. *See* ***United States v. Armstrong***, 951 F.2d 626, 630 (5th Cir. 1992); ***United States v. Colon-Padilla***, 770 F.2d 1328, 1334 n.6 (5th Cir. 1985); *see also* ***United States v. Saenz***, 282 F.3d 354, 356 (5th Cir. 2002) (Rule 15 appropriate for amending habeas petition).

Banks contends, however, that discovery and declarations from Cook and Farr demonstrated their extensive discussions with the prosecutors, leading to the production of the transcript. Following this production, the magistrate judge ruled that one issue for which evidence would be received concerned, *inter alia*, the State's "withholding exculpatory and impeachment evidence concerning at least two important witnesses – Charles Cook and Robert Farr".

The transcript was introduced at the federal hearing to establish the ***Brady*** claim of suppression of material impeachment evidence. Instead of objecting because Banks either was expanding his due process claim or failed to exhaust his claims in state court, the State, according to Banks, signaled to the court in pre-trial submissions that it intended to utilize the transcript and to

call Bowie County ADA Elliot and Deputy Huff to defend against Banks' due process claim.

Accordingly, Banks contends Rule 15(b) applies: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings". FED. R. CIV. P. 15(b). "[O]nce issues are presented and argued without objection by opposing counsel, such issues are tried by implied consent of the parties and are treated as if they had been raised in the pleadings". ***Apple Barrel Productions, Inc. v. Beard***, 730 F.2d 384, 389 (5th Cir. 1984); *see also* ***Hardin v. Manitowoc-Forsythe Corp.***, 691 F.2d 449, 456 (5th Cir. 1982)("The test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence....").

Because of the discovery order, the discussion of the issue at the federal hearing, and Banks' cross-examination of the State's witnesses, Banks maintains the State had sufficient notice that suppression of the transcript was included within the ***Brady*** claim. Therefore, Banks asserts this claim was before the district court. *See* ***Mongrue v. Monsanto Co.***, 249 F.3d 422, 427-28 (5th Cir. 2001).

The State counters: a federal evidentiary hearing is not a trial for Rule 15 purposes; it opposed Banks' hearing request, maintaining, pursuant to ***Keeney***, 504 U.S. at 5-6 (if petitioner fails to develop claim in state court, must show cause and

prejudice to receive federal evidentiary hearing), he was not entitled to one; no authority exists to suggest an evidentiary hearing waives exhaustion or procedural default defenses or the requirement that Banks must amend his petition to assert additional claims; and Banks' questioning witnesses at an evidentiary hearing does not substitute for his not amending his petition.

On this issue, the district court correctly determined: in his petition, Banks did not state a ***Brady*** claim concerning the transcript, because Banks did not learn of it until *three years after* it was filed; Banks should have sought leave to amend his petition to add this claim; and issues first raised in objections to a report and recommendation are not properly before the district court. *See* ***Armstrong***, 951 F.2d at 630. Further, Banks has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial. Banks has failed to demonstrate "jurists of reason would find it debatable whether the district court was correct" in denying his Rule 59 motion. ***Slack***, 529 U.S. at 484.

b.

Also denied was the ***Brady*** claim of suppression of assurances to Cook that, in exchange for favorable testimony, prosecutors would arrange for dismissal of the pending arson charge. Banks asserts: the charge was discussed by Deputy Huff and Cook; the Deputy informed Cook of the filing of habitual offender papers

(life imprisonment); prior to trial, Cook was provided daily conjugal visits with his wife; and the charge was dismissed the day after Cook's testimony because ADA Elliot and Deputy Huff traveled to Dallas with Cook, where Elliot spoke to the prosecutor there.

Banks bases error on the district court's: relying on "misleading evidence" submitted in state court proceedings; and finding the Dallas County prosecutor stated by affidavit there was no prearranged plea bargain. Banks contends, and the State concedes, that the affidavit shows the prosecutor was involved in an unrelated forgery prosecution against Cook more than a year after Banks' trial. Banks contends the evidence sufficiently shows the denial of a constitutional right, citing ***Giglio*** (suppression of a deal with prosecution's witness).

The State counters that the evidence submitted during the state habeas proceedings was not misleading. In those proceedings, in its response to this claim, the State provided affidavits from Deputy Huff, ADA Elliot, and former Dallas County ADA Byrne.

Byrne's 12 May 1992 affidavit states in relevant part: he was a Dallas County ADA in *June 1981* (eight months after Banks' trial); he was the prosecuting attorney in ***State of Texas v. Charles Edward Cook***, No. F81-2140-P; and he had no recollection of any deal in exchange for Cook's testimony in Banks' trial. Banks explained in his state court reply that Byrne was the prosecutor for the forgery conviction following Banks' trial. The state habeas court found

"no agreement between the State and ... Cook". As noted, state court factual findings are entitled to a presumption of correctness. ***See Green***, 116 F.3d at 1120 (applying pre-AEDPA law); 28 U.S.C. § 2254(d) (1994).

Further, the State maintains the district court's ruling was not based solely on Byrne's affidavit but considered all the evidence: the arson occurred on 7 May 1980, 13 days after Cook's April 1980 statement; Bowie County District Attorney Raffaelli stated at trial no deal had been made in exchange for Cook's testimony; ADA Elliott denied any discussions with Cook prior to Banks' trial but, following it, discussed Cook's favorable testimony with a Dallas County prosecutor when he (Elliott) returned Cook there; the discussion with that prosecutor was not a reward for Cook, but was done because Elliot wanted that prosecutor to know Cook had cooperated with law enforcement and hoped the same would be done for him in cases he was handling.

The magistrate judge recommended that Cook's testimony at the federal hearing provided Banks' only evidence of a deal between the State and Cook or of threats to compel his testimony. Citing ***Spence v. Johnson***, 80 F.3d 989 (5th Cir.), *cert. denied*, 519 U.S. 1012 (1996), the magistrate judge recommended denying relief on this claim because "the evidence and testimony presented by Cook in this matter [are] *not* credible". (Emphasis added.) Needless to say, testimony from recanting witnesses is properly viewed with

suspicion, because it: upsets the finality of convictions; is often unreliable, given suspect motives; and often serves to impeach cumulative evidence, rather than undermine the accuracy of the conviction. ***Dobbert v. Wainwright***, 468 U.S. 1231 (1984) (Brennan, J., dissenting); ***May v. Collins***, 955 F.2d 299, 314 (5th Cir.), *cert. denied*, 504 U.S. 901 (1992); see *also* ***Olson v. United States***, 989 F.2d 229, 231 (7th Cir.), *cert. denied*, 510 U.S. 895 (1993); ***United States v. Provost***, 969 F.2d 617, 620 (8th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993).

Banks disagrees with the district court's credibility determinations. It goes without saying that we "accept magistrate judge's findings [adopted by the district judge] unless they are clearly erroneous". ***United States v. Breeland***, 53 F.3d 100, 103 (5th Cir. 1995) ("Clear error is *especially rigorous* when applied to *credibility determinations* because the trier of fact has seen and judged the witnesses." (Emphasis added; internal quotation marks omitted.)).

The findings with respect to Cook and ADA Elliot were "plausible in light of the record viewed in its entirety". ***Id.*** (internal quotation marks omitted). And, again, the state habeas court's identical finding is entitled to a presumption of correctness. *See* ***Green***, 116 F.3d at 1120. Banks has failed to

demonstrate the district court's assessment of this ***Brady*** claim was debatable or wrong. *See* ***Slack***, 529 U.S. at 484.

2.

For the COA requested for ineffective-assistance at the guilt phase, *see* ***Strickland***, 466 U.S. at 668, Banks claims failure: to investigate; to prepare for trial; and to effectively cross-examine witnesses. (In addition, in the heading of one section of his brief here, Banks states counsel was ineffective for failing "To Object to Prosecutor's Repeated Vouching for [Farr's and Cook's] Credibility". Because of the contemporaneous objection rule, this failure-to-object prevented Banks from raising a prosecutorial misconduct claim. *See* ***Jackson***, 194 F.3d at 652. But, because counsel was unaware of Farr's paid-informant status and Cook's prior statements, there was no deficient-performance in this regard. Further, this claim was never raised in district court and is not properly before us. *See, e.g.*, ***Dowthitt v. Johnson***, 230 F.3d 733, 741 n.3 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); ***Puckett***, 176 F.3d at 814; ***Hallmark***, 118 F.3d at 1079 n.3; ***Yohey***, 985 F.2d at 226.)

Obviously, a reasonable attorney engages in "a reasonable amount of pretrial investigation", including interviewing potential witnesses and making an independent investigation of the facts and circumstances, ***Bryant v. Scott***, 28 F.3d 1411, 1415 (5th Cir. 1994), and adequately and independently searching for available defense

evidence. *See Moore v. Johnson*, 194 F.3d 586, 608 (5th Cir. 1999) (lack of investigation into evidence in state's file and evidence used to counter defendant's alibi defense).

Banks also contends an ineffective-assistance claim involves consideration of the strength of the State's case. Restated, a weak case for the State means counsel's ineffective performance has a much greater impact on the trial's outcome. For example, in **Bryant**, the court noted that the lack of physical evidence connecting the defendant to the crime scene increased the importance of pre-trial investigation of eyewitnesses; something a reasonable lawyer would have realized and acted upon. 28 F.3d at 1418.

Banks contends that, in the light of the evidence at the examining hearing four months before trial, his counsel should have investigated the following: Banks' claim he hitchhiked to Dallas, which contrasted with the State's contention he drove the victim's vehicle there; the victim's time of death; and Cook's credibility.

First, the State's theory was that, after shooting the victim, Banks drove his automobile to Dallas. Investigating the identity of the individual who (according to Banks) allegedly picked Banks up and drove him to Dallas or finding ways to attack the State's view that Banks drove an automobile with serious electrical problems to Dallas would have been important to Banks' defense.

Second, concerning the claimed time of death, Banks arrived in Dallas by 8:30 a.m. on Saturday. The victim was killed approximately 180 miles from Dallas. Therefore, evidence that the victim was shot after 5:00 a.m. on Saturday would have been exculpatory.

And third, Cook was the only witness to testify that Banks made incriminating statements. Obviously, Cook's credibility and the reliability of his account of the events of the 12 April weekend were critical.

Additionally, Banks contends that, other than his counsel's (Cooksey's) speaking to witnesses identified by Banks' common-law wife a few days after Cooksey was retained, Cooksey did little else. He filed several pretrial motions but did not ask to be heard pre-trial. Further, his remarks on the record demonstrate his lack of preparation: on the first day of jury selection, "I'm not in possession of any information on any of the State's witnesses"; after jury selection, prior to further proceedings, "I don't have [a list of prosecution witnesses' prior convictions] yet and I can not effectively cross-examine these people without it"; and during those subsequent proceedings, I've "never been to the [crime scene] ... I don't even know where it is" and "I haven't seen the ballistics report".

Banks cites other claimed ineffective-assistance. During trial, in cross-examining two persons who were with the victim on

Friday night, 11 April, Hicks and Bungardt (he didn't cross-examine the latter), Cooksey failed to develop the full extent of the problems with the victim's automobile. Counsel made no effort to attack Fisher's recollection of two gunshots as unreliable because of Fisher's groggy state, with Fisher's testimony being the State's only evidence of time of death. (In closing arguments, Cooksey stated: Fisher "certainly told you [the jury] the truth, without a doubt".) He did not cross-examine Deputy Huff. And, his cross-examination of the medical examiner pertained only on the amount of alcohol consumed by the victim prior to his death.

Banks contends: had Cooksey reasonably prepared for trial, he could have demonstrated the autopsy report and crime scene evidence suggested time of death was 12 to 24 hours after Fisher reported hearing the gunshots. In support, Banks notes: rigor mortis appears very soon after death, *usually* rendering the body stiff within 12 to 24 hours and *usually waning about 36 hours following death*; nevertheless, Deputy Huff and Dr. DiMaio observed full rigor mortis in the body, even though Deputy Huff did not observe the victim until approximately 54 hours after Fisher heard the loud noises and Dr. DiMaio observed him roughly 24 hours after Deputy Huff. Banks also notes: 72 hours after death, DiMaio should have observed a drying of the lips, a graying discoloration of the lower abdomen, and clouding of the corneas; however, although DiMaio looked for these symptoms, he found none.

Likewise, Banks contends reasonable preparation would have resulted in: having a mechanic testify about the unreliability of the victim's automobile; exposing the difference between Hicks' and Bungardt's testimony about a defective car and Cook's testimony never mentioning any problems with it (in the state habeas proceedings, the court concluded it was highly unlikely the vehicle described by Hicks and Bungardt could have been driven to Dallas without major repair work); and adequately cross-examining arguably non-hostile prosecution witnesses.

Accordingly, Banks contends he has shown deficient-performance and prejudice considering his counsel's approach to the entire trial, including the witnesses and readily available evidence that could have provided the jury with reasonable doubt.

In countering these sweeping assertions, the State reminds that, on the merits, Banks must show "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment". ***Strickland***, 466 U.S. at 687; ***see also Bell v. Cone***, 122 S. Ct. 1843 (2002); ***Lackey v. Johnson***, 116 F.3d 149, 152 (5th Cir. 1997). Judicial scrutiny must be "highly deferential". ***Strickland***, 466 U.S. at 689; ***see also Bell***, 122 S. Ct. at 1852. Again, for prejudice, Banks must (on the merits) demonstrate to a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Williams v. Taylor***, 529 U.S. 362, 391 (2000) (citing

Strickland, 466 U.S. at 694). (Of course, to obtain a COA, he must make only a substantial showing of ineffective assistance.)

Concerning time of death, the State contends that, at the evidentiary hearing, Banks' expert conceded (as discussed *supra*) it was possible the victim was killed at the time the State theorized. Accordingly, the State asserts Banks failed to prove the result of the trial would have been different.

Concerning the victim's automobile, the State contends Banks failed to sufficiently plead these claims with specificity and to show what evidence such investigations would have revealed. Banks must state with specificity what the investigation would have revealed and how it would have altered the outcome. ***See United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989).

The State contends Banks merely makes conclusory and speculative allegations which do not sufficiently raise constitutional issues to justify relief. ***See Blackledge v. Allison***, 431 U.S. 63, 74 (1977); ***Barnard v. Collins***, 958 F.2d 634, 643 n.11 (5th Cir. 1992), *cert. denied*, 506 U.S. 1057 (1993); ***Ross v. Estelle***, 694 F.2d 1008, 1012 (5th Cir. 1983). The State maintains the district court also implicitly rejected these claims because they were improperly raised in Banks' proposed findings and conclusions rather than in his habeas claim; and, considering Banks' conclusory claims, this implicit rejection was not an abuse of discretion. ***See United States v. Cervantes***, 132 F.3d 1106, 1111

(5th Cir. 1998) (refusal to consider claims raised by unauthorized amendments reviewed for abuse of discretion) (citing ***United States v. Armstrong***, 951 F.2d 626, 630 (5th Cir. 1992); ***Barksdale v. King***, 699 F.2d 744, 747 (5th Cir. 1983)).

For purposes of obtaining a COA, Banks does not show reasonable jurists would find it debatable whether Cooksey's performance was deficient. Cooksey did not personally investigate certain aspects of the case; but, his investigator did conduct an investigation, which included visiting the crime scene and interviewing witnesses. Further, although Banks can speculate about Cooksey's cross-examination techniques, Cooksey has never been asked to explain these aspects of his trial strategy (even though, in state habeas proceedings, he did provide testimony concerning Banks' ***Swain*** claim).

Moreover, for purposes of obtaining a COA, and assuming deficient-performance in investigation, trial preparation, and cross-examination, Banks has failed to show, for the prejudice prong, that "reasonable jurists would find the district court's assessment ... debatable or wrong". ***Slack***, 529 U.S. at 484. Banks has not made a substantial showing that the trial-result would be different. His expert conceded the time of death could have been as the State suggested; Banks does not show that the alleged errors would have changed the jury's consideration of Cook's testimony concerning Banks' confession to him; and Banks' allegations

concerning problems with the victim's automobile are too conclusory and do not show how that evidence could have provided reasonable doubt.

3.

Near the end of jury selection, Banks passed Cooksey a note: "[W]e need[] black[s]". Cooksey responded: "State will strike all blacks". Indeed, the State used four peremptory strikes to remove all qualified blacks from the jury pool. Accordingly, Banks presents a ***Swain*** claim.

As noted, concerning this claim, *no* contemporaneous objection was made at trial. Banks contends it is not procedurally barred by counsel's failure to raise it at trial because it was rejected on the merits in state habeas proceedings and because the State waived the defense by not raising it in a timely manner and by electing to resolve the claim on the merits. Further, Banks asserts: we should not defer to the state court's ruling; and he has made a *substantial showing* of the denial of a constitutional right, namely that Bowie County prosecutors engaged in the systematic exclusion of black jurors continuing through Banks' trial.

In his first state habeas application, Banks pleaded a ***Swain*** claim. The State did not claim untimeliness; and the court recommended its denial on the merits, finding "no systematic exclusion by the State of any black veniremen or jurors in contravention of [Banks'] rights". On appeal, the State again made

no waiver or procedural default assertion; the claim was denied based on the trial court's findings. ***Ex Parte Banks***, No. 13,568-01 (Tex. Crim. App. 1984) (unpublished).

In his third state application, Banks again raised his ***Swain*** claim; the State urged denial on the merits; and the trial court recommended denial. On appeal, the State claimed, *for the first time*, that Banks defaulted his ***Swain*** claim because Cooksey failed, at trial, to make a contemporaneous objection.

On remand to the trial court for an evidentiary hearing on, *inter alia*, the ***Swain*** claim, that court found Cooksey failed to raise the claim because he did not believe the prosecutors' practices showed a ***Swain*** violation, and consequently, the claim was procedurally barred. In addition, the court reached the merits of the claim. As discussed *supra*, although it concluded the evidence showed a *prima facie* case of systematic exclusion, it found the peremptorily-struck four black jurors were removed for non-racial reasons. On appeal, the claim was denied for the reasons given by the trial court. ***Ex Parte Banks***, No. 13,568-03 (Tex. Crim App. 1996) (unpublished).

Banks contends the district court incorrectly found Texas' contemporaneous objection rule is an adequate and independent ground for procedural default, claiming the rule was not "firmly established and regularly followed" at the time of the default. ***Ford v. Georgia***, 498 U.S. 411, 423-24 (1991) (quoting ***James v.***

Kentucky, 466 U.S. 341, 348 (1984)). The inquiry is whether the rule "is strictly or regularly applied evenhandedly to the vast majority of similar claims", ***Amos v. Scott***, 61 F.3d 333, 339 (5th Cir.) (emphasis removed), *cert. denied*, 516 U.S. 1005 (1995), or "identical claims", ***id.*** at 343; *see also* ***Finley v. Johnson***, 243 F.3d 215, 218 (5th Cir. 2001); ***Martin v. Maxey***, 98 F.3d 844, 847-48 (5th Cir. 1996).

Banks asserts that, although Texas courts regularly apply the contemporaneous objection rule to other types of claims, they have not strictly and regularly applied it to ***Swain*** claims. *See, e.g.*, ***Hogue v. Johnson***, 131 F.3d 466 (5th Cir. 1997) (applying rule to unobjected-to introduction of prior convictions), *cert. denied*, 523 U.S. 1014 (1998); ***Clark v. Collins***, 19 F.3d 959 (5th Cir.) (***Batson v. Kentucky***, 476 U.S. 79 (1986), claim), *cert. denied*, 513 U.S. 1036 (1994); ***Harris v. Collins***, 990 F.2d 185, 187 (5th Cir.) (***Batson*** claim), *cert. denied*, 509 U.S. 933 (1993). Banks contends the court in ***Ex Parte Haliburton***, 755 S.W.2d 131, 135 n.5 (Tex. Crim. App. 1988), reached the merits of a ***Swain*** claim even though the defendant failed to show he timely objected at trial; and, in ***Chambers v. State***, 568 S.W.2d 313 (Tex. Crim. App. 1978), *cert. denied*, 440 U.S. 928 (1979), although it was unclear the issue was preserved because it was not raised in the new trial motion, the court addressed the merits of a claim that blacks were

systematically excluded from jury service. Banks also contends a ***Batson*** claim is not a "similar claim" because ***Batson*** claims solely consider a prosecutor's use of peremptory strikes in individual trials and depend on contemporaneous credibility determinations to explain a discriminatory pattern of strikes; on the other hand, ***Swain*** claims look at prosecutors' historical, systematic, and continued discriminatory jury selection practices.

Banks also contends: the Supreme Court has never held its procedural default jurisprudence applies to ***Swain*** claims; they are unlike any other a defendant might raise at trial because the claim requires collection of extensive historical material which is hard to collect prior to trial; and, indeed, the reason the Court rejected ***Swain*** for ***Batson*** was because the facts necessary to support a ***Swain*** claim were not reasonably available at trial.

The State correctly contends federal habeas relief is precluded when the last state court judgment relies upon an independent and adequate state procedural bar. ***Coleman v. Thompson***, 501 U.S. 722, 729-30 (1991); ***Harris v. Reed***, 489 U.S. 255, 264 & n.10 (1989) (even if the state court reaches the merits of the claim); ***Buxton v. Collins***, 925 F.2d 816, 821 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991).

Banks' contention that Texas does not firmly apply the contemporaneous objection rule to ***Swain*** claims is undermined by case law. *See* ***Trevino v. Texas***, 503 U.S. 562, 566-67 (1992)

(failure to challenge in some form the exclusion of black jurors implicates contemporaneous objection rule); ***Teague v. Lane***, 489 U.S. 288, 297 (1989). Texas courts regularly applied the rule in the pre-***Batson***, ***Swain*** era. ***Williams v. State***, 773 S.W.2d 525, 534-35 (Tex. Crim. App. 1988), *cert. denied*, 493 U.S. 900 (1989) ***Mathews v. State***, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989).

In response to the cases cited by Banks, the State contends ***Chambers*** assumed, without deciding, that the issue was properly before it, *see* 568 S.W.2d at 328, but stated the failure to object waives the right and bars consideration on appeal. ***Id.*** at 319. Also, ***Ex Parte Halliburton*** merely stated: "[W]e could not say prior to applicant's evidentiary hearing that he needed to object at trial in order to preserve ***Swain*** error". 755 S.W.2d at 135 n.5. Further, "an occasional act of grace by the Texas court in entertaining the merits of [a] claim that might have been viewed as waived by procedural default" does not constitute failure to regularly apply the rule. ***Hogue***, 131 F.3d at 487 (internal quotation marks omitted); ***Bass v. Estelle***, 705 F.2d 121, 122-23 (5th Cir.), *cert. denied*, 464 U.S. 865 (1983).

Additionally, the State asserts the contemporaneous objection rule is applied to substantially similar claims because ***Batson*** merely changed the quantum of proof rather than the type claim asserted. *See, e.g.*, ***Andrews v. Collins***, 21 F.3d 612, 621 (5th

Cir. 1994) (***Batson*** claim), *cert. denied*, 513 U.S. 1114 (1995); ***Harris v. Collins***, 990 F.2d 185, 187 (5th Cir.) (same), *cert. denied*, 509 U.S. 933 (1993); ***Jones v. Butler***, 864 F.2d 348, 369-70 (5th Cir. 1988) (pre-***Batson***, ***Swain*** provided a means to raise a ***Batson***-type claim.), *cert. denied*, 490 U.S. 1075 (1989); *see also* ***Wright v. Hopper***, 169 F.3d 695, 709 (11th Cir.) (***Swain*** claim procedurally defaulted for failure to object), *cert. denied*, 528 U.S. 934 (1999).

Finally, Banks contends the State waived the procedural default defense by not timely raising it. (Banks also asserts the State's failure to raise this defense shows the contemporaneous objection rule is not a firmly established rule for ***Swain*** claims.) "[P]rocedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" ***Trest v. Cain***, 522 U.S. 87, 89 (1997) (quoting ***Gray v. Netherland***, 518 U.S. 152, 166 (1996)); *see also* ***Engle v. Isaac***, 456 U.S. 107, 124 n.26 (1982) ("[A] State's plea of default may come too late to bar consideration of the prisoner's constitutional claim".). In the exhaustion context, the Supreme Court rejected a rule allowing, or even encouraging, "the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense ... for use on appeal [because the rule might] prolong the

prisoner's confinement for no other reason than the State's postponement of the [] defense...." ***Granberry v. Greer***, 481 U.S. 129, 132 (1987).

A State waives a procedural bar defense by failing timely to raise it. ***Fisher v. Texas***, 169 F.3d 295 (5th Cir. 1999)(waiver for failure to raise the defense in district court); ***Emery v. Johnson***, 139 F.3d 191, 195 n.4 (5th Cir. 1997) (waiver for failure "to plead procedural bar in the district court") (citing ***United States v. Marcello***, 876 F.2d 1147, 1153 (5th Cir. 1989)), *cert. denied*, 525 U.S. 969 (1989); *see also* ***Cooper v. State***, 791 S.W.2d 80 (Tex. Crim. App. 1990) (en banc) (state's obligation to raise the issue before the appellate court); ***Tallant v. State***, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) (*en banc*) ("[T]he State must call to the attention of the court of appeals in orderly and timely fashion that an alleged error was not preserved."). On the other hand, waiver is averted if the State raises the default "*at any point* in the district court proceedings". ***Wiggins v. Procunier***, 753 F.2d 1318, 1321 (5th Cir. 1985) (emphasis added). It is undisputed the State then raised the issue; therefore, in this regard, Banks' assertion fails.

Assuming he defaulted on his ***Swain*** claim, Banks contends: he has shown sufficient cause and prejudice. *See, e.g.*, ***Harris v. Reed***, 489 U.S. 255 (1989). He maintains ineffectiveness of

counsel, ***Murray v. Carrier***, 477 U.S. 478, 488-89 (1986), or conflict of interest, ***Cuyler v. Sullivan***, 446 U.S. 335 (1980), provide sufficient cause. Banks contends his trial counsel was ineffective for: failing to object; failing to conduct a reasonable investigation; and misunderstanding his burden of proof.

Failure to make a contemporaneous ***Swain*** objection may constitute deficient-performance, providing cause for procedural default in the light of the evidence supporting the ***Swain*** claim. ***Jackson v. Herring***, 42 F.3d 1350, 1358 (11th Cir.), *cert. dismissed*, 515 U.S. 1189 (1995). In the state habeas proceedings, Cooksey testified he "probably would have" raised a ***Swain*** objection had he possessed historical evidence of a practice of systematic exclusion of black venire members and would have raised the claim if there had been even a "scintilla of success". Banks contends Cooksey, as the former District Attorney, was uniquely aware of the practice.

During the last four years of Cooksey's tenure as District Attorney, 94% of black venire members were struck compared with approximately 20% of whites. In this regard, at the state evidentiary hearing, Cooksey conceded the District Attorney's striking practice, including at Banks' trial, was racially disproportionate - over 92% of black venire members struck peremptorily compared to less than 20% of whites. Given Cooksey's

knowledge, Banks contends Cooksey's failure to object was not a reasonable tactical decision.

Banks further contends Cooksey failed to conduct a "reasonable investigation" into the viability of a ***Swain*** claim. ***Strickland***, 466 U.S. at 691. The state habeas court found Cooksey: was aware of ***Swain***; evaluated his chances for a successful challenge; and concluded he could not prevail. On the other hand, it also found the statistics presented "a prima facie case" of exclusion. Banks contends: the record is devoid of any evidence of investigation into the merits of a ***Swain*** claim; and Cooksey's testimony was that he did not raise a ***Swain*** claim because, in an earlier case prosecuted by Raffaelli, he (Cooksey) noticed two blacks were on the jury, even though he conceded on cross-examination that ***Swain*** required an examination of the striking practice over a series of cases. Banks maintains these inconsistencies, coupled with counsel's assurance, during jury selection, that the "State will strike all blacks", suggests Cooksey's failure to investigate was not sound trial strategy and fell below "the range of competence demanded of attorneys in criminal cases". ***Cook v. Lynaugh***, 821 F.2d 1072, 1078 (5th Cir. 1987) (quoting ***McMann v. Richardson***, 397 U.S. 759, 771 (1970)).

Again, counsel "must have a firm command of the facts of the case as well as the governing law before he can render reasonably effective assistance". ***Ex Parte Welborn***, 785 S.W.2d 391, 393 (Tex.

Crim. App. 1990). Cooksey had an erroneous view of the ***Swain*** burden of proof. He believed statistical proof was not useful under the circumstances; and that, beyond establishing a *prima facie* case, the defendant must prove the prosecutor's discriminatory intent. Establishing a *prima facie* case, however, shifts the burden to the State to rebut the presumption of discrimination. ***Willis v. Zant***, 720 F.2d 1212, 1220-21 (5th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

Because the failure to object resulted in an all-white jury, Banks contends Cooksey's deficient-performance prejudiced him. Systematic exclusion of blacks from petit juries slants the judicial process unfairly against black defendants. ***See Hollis v. Davis***, 941 F.2d 1471, 1482 (11th Cir. 1991) ("[W]e would have greater confidence in the [result reached by a racially mixed jury], finding much less probability that racial bias had affected it".), *cert. denied*, 503 U.S. 938 (1992); ***see also Cassell v. Texas***, 339 U.S. 282 (1950) (Jackson, J. dissenting).

The State responds: the state habeas court found Cooksey evaluated his chances of success and determined a ***Swain*** claim would have been frivolous; and, because Texas courts have repeatedly rejected ***Swain*** claims, ***see Andrews***, 21 F.3d at 623; ***Evans v. State***, 622 S.W.2d 866 (Tex. Crim. App. 1981), deciding to forgo the ***Swain*** claim was not constitutionally deficient, ***see id.***; ***Wiley v.***

Puckett, 969 F.2d 86, 102 (5th Cir. 1992); ***Koch v. Puckett***, 907 F.2d 524, 526 (5th Cir. 1990). Because Texas courts repeatedly reject ***Swain*** claims, the State also contends any objection would have been unsuccessful, which prevents Banks from demonstrating prejudice.

Also, Banks claims Cooksey had a conflict of interest because a ***Swain*** claim would implicate him in his prior role as District Attorney. To warrant relief from procedural default, however, the conflict must have been actual, not merely speculative. ***Barrientos v. United States***, 668 F.2d 838, 841 (5th Cir. 1982). Actual conflict exists when "a defense attorney owes duties to a party whose interests are adverse to those of the defendant". ***Zuck v. Alabama***, 588 F.2d 436, 439 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also* ***United States v. Martinez***, 630 F.2d 361 (5th Cir. 1980) (previous representation of prosecution witness), *cert. denied*, 450 U.S. 922 (1981); ***Stephens v. United States***, 595 F.2d 1066 (5th Cir. 1979) (concurrent representation of prosecution witness). Banks contends the conflict in this case was exposing a practice that Cooksey had engaged in for years.

The State responds that Banks has failed to show a conflict of interest under ***Cuyler***, 446 U.S. at 348. *See* ***Hernandez v. Johnson***, 108 F.3d 554, 559-60 (5th Cir.) (assuming without deciding the ***Cuyler*** standard applies when a former district attorney represents

a defendant), *cert. denied*, 522 U.S. 984 (1997). Banks must show: trial counsel's situation was "inherently conducive to divided loyalties", ***Perillo v. Johnson***, 205 F.3d 775, 801 (5th Cir. 2000) (internal quotation marks omitted); and counsel did not pursue the strategy because of the conflict, ***Hernandez***, 108 F.3d at 560. Because mere conclusory allegations are insufficient, ***Perillo***, 205 F.3d at 802, Banks has failed to show any evidence in the record that Cooksey failed to make the ***Swain*** objection because of his former position. *See also* ***Mickens v. Taylor***, 122 S. Ct. 1237 (2002).

For COA purposes, the ***Swain*** claim was procedurally defaulted. Texas courts regularly apply the contemporaneous objection rule to ***Swain***, as well as to similar ***Batson***, claims. As for cause and prejudice to overcome the default, although it may be that counsel was deficient in not contemporaneously raising this claim, Banks has failed to show prejudice sufficient to overcome the bar. In the light of the state court's finding of a *prima facie* ***Swain*** violation, the State proved that, for Banks' trial, no black venire member was excluded because of his or her race. Consequently, for his ***Swain*** claim, Banks fails to make a substantial showing of the denial of a constitutional right.

Banks contends the evidence fails to establish future dangerousness beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307 (1979). At trial, the State relied upon the underlying facts of the crime, Vetrano Jefferson's testimony of Banks' unprovoked assault with a pistol, and Farr's testimony that Banks sought to reclaim his pistol in Dallas in order to commit armed robbery and, if necessary, eliminate witnesses. Banks maintains evidence revealed in this appeal establishes: Jefferson's testimony as to who was the aggressor was misleading; Farr's testimony was false; and, without their testimony, the evidence did not establish future dangerousness.

Although Banks contested sufficiency of the evidence in each of his three state habeas petitions, he did *not* do so on direct appeal. *The last state court judgment on this issue* (third state habeas proceeding) held his claim meritless and expressly and unambiguously applied a procedural bar:

> The evidence is sufficient to support an affirmative answer to the second [future dangerousness] special issue. *This claim is procedurally barred.* Sufficiency of evidence may *not* be raised in collateral attack. ***Ex parte Brown***, 757 S.W.2d 367 (Tex. Crim. App. 1988); ***Ex parte Williams***, 703 S.W.2d 6[74] (Tex. Crim. App. 1986).

Ex Parte Banks, No. 80-F-86-102-C (D. Ct. Bowie County 22 Feb. 1993) (unpublished)(emphasis added). The Court of Criminal Appeals

summarily accepted the findings and conclusions. ***See Ex Parte Banks***, No. 13,568-03 (Tex. Crim. App. 11 Jan. 1996) (unpublished).

Accordingly, the district court held the claim defaulted. *See* ***Coleman***, 501 U.S. 739-30. As discussed *supra*, even if the state court reaches the merits of a claim, federal courts must honor an independent and adequate procedural bar. ***Harris***, 489 U.S. at 264 n.10; ***Corwin v. Johnson***, 150 F.3d 467, 473 (5th Cir.), *cert. denied*, 525 U.S. 1049 (1998). The state court's invocation of the bar must be clear and express; and the bar must be followed regularly by state courts and applied to a majority of identical or similar claims. ***Finley***, 243 F.3d at 218; ***Martin***, 98 F.3d at 847-48; ***Amos***, 61 F.3d at 341.

Texas courts regularly apply this bar to claims raised for the first time on collateral review. *See, e.g.*, ***Ex parte Sanchez***, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). And, as a bar to federal habeas review, our court has similarly acknowledged Texas courts' application of this bar. *E.g.*, ***Renz v. Scott***, 28 F.3d 431, 432 (5th Cir. 1994); ***Clark v. State of Texas***, 788 F.2d 309, 310 (5th Cir. 1986).

Nevertheless, Banks asserts: because "state courts repeatedly forgave [the failure to raise the claim on direct appeal] and reviewed the claim on its merits during [his] first and second [state] proceedings", the state court's default determination, *in*

his third habeas proceeding, was actually a determination that the court would not again review the merits. This contention ignores the clear language of the above-quoted last state court decision, applying the procedural bar.

Banks further submits that, even if the claim is defaulted, given the record before the court, a miscarriage of justice will occur in the absence of review. ***Calderon v. Thompson***, 523 U.S. 538 (1998); ***Schlup v. Delo***, 513 U.S. 298 (1995). According to Banks, at the federal evidentiary hearing: Farr testified his penalty phase testimony was a misrepresentation, because Banks had no plans to commit further crimes; Vetrano Jefferson testified his trial testimony was misleading, because he was the aggressor and Banks acted primarily to protect his pregnant common-law wife; and Banks' unrebutted time of death evidence made it unlikely he could have committed the crime. Banks contends the new evidence shows by clear and convincing evidence that, had the jury known of this evidence, he would not have been convicted or sentenced to death. *See* ***Reasonover v. Washington***, 60 F. Supp. 2d 937 (E.D. Mo. 1999) (key witness testimony fabricated and another witness received sentencing leniency); ***Richter v. Bartee***, 973 F. Supp. 1118 (D. Neb. 1997) (new evidence that complainant fabricated sexual assault).

As the State correctly observes, the miscarriage of justice exception is reserved for cases of factual innocence. ***See Rodriguez v. Johnson***, 104 F.3d 694, 697 (5th Cir. 1997). The State

contends: the testimony by Farr and Vetrano Jefferson had *nothing* to do with whether Banks murdered the victim; Banks failed to identify recanted testimony from Cook showing Banks' actual innocence; and Banks' expert admitted it was possible the victim was shot when Fisher reported hearing the loud noises.

For COA purposes, the last state court to address Banks' sufficiency claim found it procedurally barred; Banks has failed to show cause and prejudice to excuse that default; and the miscarriage of justice exception does not apply. In sum, Banks has not shown that jurists of reason would find it debatable that the district court was incorrect in ruling Banks defaulted this claim.

III.

For the foregoing reasons, we **DENY** the COA requests; **REVERSE** and **DENY** the grant of habeas relief; and, therefore, **RENDER** judgment for Respondent.

COA and HABEAS RELIEF DENIED; JUDGMENT REVERSED and RENDERED

APPENDIX B

E.O.D. 8/18/98

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DELMA BANKS, JR.	§	
	§	
V.	§	No. 5:96CV353
	§	JUDGE DAVID FOLSOM
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division	§	

MEMORANDUM OPINION AND ORDER

On March 7, 1996, Petitioner, Delma Banks, Jr., an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed his petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2241 and § 2254. On August 14, 1998, this case was referred pursuant to 28 U.S.C. § 636(b)(1) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges, for deciding all preliminary motions and for issuing a report and recommendation with respect to the final disposition of the petition for writ of habeas corpus. The Court has received and considered the Report of the United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence.

The Magistrate Judge recommended the petition for habeas corpus relief be conditionally granted and the writ of habeas corpus should issue unless the State vacates Petitioner's death sentence and imposes a sentence less than death, or orders a new punishment hearing within 120 days. The Petitioner and the Respondent both submitted objections to the Magistrate Judge's report. Having made a *de novo* review of the objections in relation to the pleadings and the applicable law, pursuant to FED.R.CIV.P. 72(b), the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections are without merit.

The Petitioner objects to the Report and Recommendation of the Magistrate Judge claiming

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that she erred by: 1) applying an incorrect legal standard demonstrating prejudice; 2) overlooking record facts in finding that trial counsel's pretrial investigation was not ineffective; 3) concluding there was no ineffectiveness with regard to Petitioner's *Swain* claim; 4) incorrectly concluding that trial counsel's performance in conducting cross-examination of the state's witnesses was not ineffective; 5) finding that Charles Cooks's recantation testimony lacked credibility; 6) concluding that Petitioner had planned to perpetrate robberies; 7) finding trial counsel's failure to object to allegedly improper remarks during closing arguments failed to show prejudice; 8) concluding that trial counsel's closing argument was neither deficient nor prejudicial; 9) concluding that Petitioner is not entitled to relief based on prosecutorial misconduct for comments made by the prosecutors during the trial; 10) finding that the failure to disclose exculpatory evidence did not prejudice Petitioner during the guilt phase of his trial; 11) recommending that Petitioner's *Swain v. Alabama* claim be denied; 12) finding that Petitioner's future dangerousness claim was procedurally defaulted; 13) recommending that Petitioner's wrongful exclusion of jurors claim be denied; and 14) recommending that Petitioner's biased juror claim be denied.

While the Court finds the Petitioner's objections to be without merit, further discussion of the issues raised in several of the objections is warranted. Petitioner objects to that portion of the Magistrate Judge's report which finds Petitioner had an intent to return to Dallas with Robert Farr, obtain a gun and commit armed robberies. The report cites Petitioner's penalty phase testimony for the foregoing proposition. A review of the record reveals Petitioner did deny he intended to commit armed robbery with Robert Farr. The Magistrate Judge's findings otherwise are not supported by the record. To the extent the Magistrate Judge found to the contrary, Petitioner's objections are sustained. However, the record also reveals Petitioner admitted he went with Robert Farr to assist Farr in obtaining a gun. 9 SR 2390-91. Petitioner admitted he knew Farr planned on committing

armed robbery with th... In fact, Petitioner admitted it was ...a to get the gun for use in the armed robberies. 9 SR 2391. Petitioner also admitted that he was with Farr when the robberies were planned to be committed. The Magistrate Judge concluded that Petitioner's testimony could have been perceived by the jury as more harmful than helpful. The Magistrate Judge's conclusion is supported by the record. Petitioner's objection in this regard is without merit, except as noted above.

Petitioner also objects to the state's obtaining an *ex parte* order on the eve of trial to allow him to be examined by the state's expert, Dr. James Grigson, regarding his future dangerousness. However, a review of the record reveals that Dr. Grigson did not testify. The only evidence presented by the state at the punishment phase was the testimony of two lay witnesses who knew Petitioner, Robert Farr and Vetrano Jefferson. Petitioner does not assert evidence presented by the state at the punishment phase of the trial was obtained by this examination. Petitioner's objection in this regard is without merit.

Petitioner objects to footnote 13 of the Report and Recommendation where the Magistrate Judge states in part: "[T]he Court does not find that the State was aware of any perjured testimony from witnesses Farr or Cook. Further, the Court does not find any evidence of perjured testimony at the trial of Banks in this matter." A review of the record reveals that Farr was a paid informant and the State knew this fact. The Magistrate Judge recommended relief on this basis. The Magistrate Judge also found that even if Farr's informant status had been revealed at trial, the outcome of the guilt phase of the trial would have been the same. There is no evidence in the record to support the conclusion Cook committed perjury. Because the Magistrate Judge recommended relief based on Farr's testimony and informant status, the Petitioner's objections in this regard have no merit. The Magistrate Judge also found that even if Farr's informant status had been revealed

at trial, the outcome of the guilt phase of the trial would have been the same. This conclusion is supported by the record before the Court. There is no evidence in the record to support the conclusion Cook committed perjury.

The Petitioner objects to the Magistrate Judge's recommendation his *Swain* claim be denied for procedural default. Citing *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex.Crim.App. 1988), and *Chambers v. State*, 568 S.W.2d 313 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 928 (1979), overruled on other grounds, 614 S.W.2d 420 (Tex.Crim.App.1980). the Petitioner asserts Texas does not apply its contemporaneous objection rule to *Swain* claims. These cases do not support Petitioner's contention. *Ex Parte Haliburton* states: "we could not say prior to applicant's evidentiary hearing that he needed to object at trial in order to preserve *Swain* error." 755 S.W.2d at 135 n. 5. This case does not stand for the proposition that contemporaneous objects are not required for a *Swain* claim. *Chambers* goes even further "Failure to object to the constitutionally improper exclusion of veniremen waives that right and such exclusion cannot be considered on appeal." 568 S.W.2d at 319. In order for *Chambers* to be applicable, the issue waived by failure to object at trial must be new or novel issue. *See id.* *Swain* was decided by the United States Supreme Court in 1965. Petitioner was tried in 1980. The issues presented in Petitioner's Swain claim were neither novel nor new in 1980. Petitioner's objection in this regard has no merit.

The Respondent objects to the Report and Recommendation of the Magistrate Judge claiming that she erred by: 1) relying on evidence adduced at a hearing to which the Petitioner was not entitled; 2) concluding that there is a reasonable probability that the outcome of Banks's punishment phase would have been different based upon the combination of ineffective assistance of counsel and failure to disclose that Farr was an informant; 3) incorrectly applied the facts not supported by the record to conclude that the *Strickland* standard was met; and 4) incorrectly

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determining that the cumulation of the ineffectiveness of Banks's counsel during punishment and of the failure of the Prosecution to disclose Farr's status as an informant rendered the outcome of the punishment phase unreliable.

The Court will address Respondent's objection to the Magistrate Judge's improper use of the cumulative error . Respondent claims that the Magistrate Judge's Report and Recommendation "repeatedly makes clear that the conclusions and recommendation were based upon the cumulative findings of both the ineffective assistance claims and the claim of failure to disclose *Brady* material." Respondent directs the Courts attention to language in the Magistrate Judge's recommendation stating that "there is a reasonable probability that but for the errors and omissions of trial counsel at the punishment phase, combined with the State's failure to disclose Farr as a paid informant, the outcome of Banks's punishment phase would have been different." *See* Report and Recommendation at 24-25. Respondent also takes issue with Magistrate Judge's finding that "In this case, the State's failure to disclose Farr's informant status, coupled with trial counsel's dismal performance during the punishment phase, undermined the reliability of the jury's verdict regarding punishment." *See* Report and Recommendation at 44.

In reviewing the Magistrate Judge's Report, the Court concludes that the Magistrate Judge separately considered and analyzed the Petitioner's ineffective assistance claim and his *Brady* claim. Of course the claims are interrelated. The Petitioner contends that the State failed to produce, and his counsel, due to inadequate preparation, contrary to *Strickland*, failed to discover, substantial evidence regarding Farr's informant status. *Cf. Martin v. Cain*, 206 F.3d 450, 457 (5th Cir. 2000). To the extent that the Magistrate Judge may have considered the cumulative effect of the errors, she was entitled to do so. The Fifth Circuit has held: "federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters

1206

of constitutional dim[illegible]n rather than mere violations of s[illegible]w; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.'" *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir.1992) (*en banc*) *(quoting Cupp v. Naughten*, 414 U.S. 141, 146-49 (1973)), *cert. denied*, 508 U.S. 960 (1993). The ineffective assistance and *Brady* claims asserted by the Petitioner involved constitutionally protected rights, were not procedurally defaulted and, according to the Magistrate Judge, rendered the results of the Petitioner's trial unreliable.

Accordingly, the findings of fact and conclusions of law of the Magistrate Judge are correct and the Report of the Magistrate Judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations. The order referring this case to the Magistrate Judge is hereby **VACATED**.

SIGNED this 18th day of August, 2000.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

1207

Upon review of the materials before this Court, we find additional facts need to be developed and the trial court is the appropriate forum in which to develop those facts. Therefore, the trial court shall conduct an evidentiary hearing on applicant's second and fourth allegations at which time applicant will be provided the opportunity to prove his allegations.

Upon conclusion of the evidentiary hearing, the trial court should enter findings of fact and conclusions of law with respect to applicant's second and fourth allegations. Specifically, with regard to applicant's second allegation, the trial court is directed to enter findings and conclusions on the following: (1) whether applicant made a timely and specific objection at trial on the basis of Swain v. Alabama, supra; (2) if no such objection was made, whether there are any factors which would excuse the failure to voice such objection; (3) whether the claim is procedurally barred; (4) whether the Bowie County District Attorney's office had a systematic and intentional practice of excluding black venire persons on the basis of race; and (5) if such practice existed, whether the practice continued unabated in applicant's trial. The trial court should also enter any further findings of fact and conclusions of law which it deems relevant to the disposition of this cause.

If applicant is found to be indigent at the time of the hearing, the trial court shall ensure that applicant is represented by counsel unless such is affirmatively waived.

Since this Court does not hear evidence, this application for post conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order. The hearing conducted pursuant to this order shall be held within 90 days of the date of this order.[1] The trial court's findings of fact and conclusions of law, the transcription of the court reporter's notes

[1]In the event any continuances are granted, copies of the order granting the continuance should be provided to this Court.

and any other supplementation of the record shall be returned to this Court within 120 days of the date of this order.[2] Applicant is granted a stay of execution pending further orders by this Court.

IT IS SO ORDERED THIS THE 3RD DAY OF MARCH, 1993.

En banc PER CURIAM
Do Not Publish
Maloney, J., would additionally file and set on allegation No. 10. McCormick, P.J., dissents to the remand, and notes that applicant procedurally defaulted on the alleged Swain v. Alabama, supra, claim at trial.

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[2]Any extension of this time period must be obtained from this Court.

APPENDIX G

NO. 80-F-86-102-C

EX PARTE | IN THE 102ND JUDICIAL

DELMA BANKS | JUDICIAL DISTRICT COURT

Applicant | OF BOWIE COUNTY, TEXAS

FILED 22 PM 1:05

Edna Sherman

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the petition for writ of habeas corpus, applicant's first, second, and third amended petition for post conviction writ of habeas corpus, respondents original answer, the affidavits, the documents filed in said cause, the official court records, Applicant's Exhibits to Rely to Respondent's Original Answer, Applicant's Appellant's Brief and the Trial Courts personal observations as the Judge in this case and as the presiding Judge of the 102nd Judicial District Court of Bowie County, Texas since January 1, 1979, the court makes the following Findings of Fact and Conclusions of Law based upon the documents filed in said cause and the official court records.

FINDINGS OF FACT

Applicant is confined pursuant to a judgment and sentence for the offense of capital murder in Cause Number 80-F-86, wherein Applicant was convicted by a jury in the 102nd Judicial District Court of Bowie County, Texas. On October 1, 1980, Applicant was sentenced to death by lethal injection. The conviction was appealed to the Court of Criminal Appeals and the

trial Court's judgment of conviction was affirmed by Opinion No. 68,933, dated November 3, 1982. Writ of Certiorari was sought in the United States Supreme Court and was denied in Opinion No. 82-6498, dated October 11, 1983.

On December 27, 1983, Applicant filed his first application for post-conviction writ of habeas corpus, which was denied by the trial court on January 2, 1984. The Court of Criminal Appeals denied the application on February 29, 1984, in Writ No. 13,568, and denied motion for rehearing on April 4, 1984.

Applicant filed a second Writ of Habeas Corpus and was denied relief in the trial court. The Court of Criminal Appeals again denied relief in Opinion No. 69,302, on September 26, 1984. On October 11, 1984, Applicant filed a motion for rehearing; on October 1, 1986, the motion for rehearing was granted. The Court of Criminal Appeals, in an En Banc decision of March 29, 1989, denied relief. A rehearing on this opinion was denied April 19, 1989. Applicant now files his third Writ of Habeas Corpus.

what was the main issue(s) in this sequence?

1. Regarding allegations of failure to reveal a secret agreement with a key witness, the Court finds there was no agreement between the State and the witness Charles Cook.

2. Defense counsel was aware of Charles Cook's criminal history and his involvement with the Applicant in this case.

3. The Court finds there was no systematic and intentional practice of using peremptory challenges to exclude qualified black venirepersons from the jury; the Court finds the statistical study submitted by Applicant to be general and non-specific with regard to its application to this case. The court finds the basic data supplied by Steven Hawkins to Dr. Tedin to be lacking in validity.

4. The Court finds blacks were adequately included in the jury panel. Most minority venirepersons in this case were disqualified based on their views concerning the death penalty.

5. The Court finds no challenge to the array was made at any time prior to, during, or after voir dire. No challenge was made as to the jury composition based on the exclusion of blacks after voir dire was completed.

6. The Court finds Lynn Cooksey ceased being District Attorney January 1, 1979. Whatever policy, if any he had, regarding jury selection ended with his tenure. Under Louis Raffaelli, his successor in office, there was no policy of systematic exclusion of blacks.

7. During my terms as District Judge, blacks have participated in the criminal justice system as grand jury commissioners, grand jurors, members of jury panels and as members of juries.

8. In addition to the instant case, three capital murder cases have been brought to trial by the Bowie County Criminal District Attorney's Office. In all three cases black jurors were impaneled and served on the jury.

9. The Court finds prospective jurors are drawn, and were so selected in Applicant's case, from the roles of registered voters in Bowie County, Texas.

10. The Court finds counsel for Applicant at trial did give the Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial.

11. The Court finds there is no evidence upon which to base the claim Applicant's death sentence was imposed by decisionmakers who acted with a racial and discriminatory purpose.

12. The Court finds no racial animus to be pervasive in this case; the Court finds in Bowie County, Texas, racial discrimination does not taint the entire criminal justice system.

13. The Court finds Applicant was not at any time, during any phase of the trial process, handcuffed in the presence of the jury or in any other place where he might possibly had been viewed by the jury.

14. The Court finds the jury did not improperly rely upon information concerning Applicant's parole eligibility in reaching its verdict as alleged in Applicant's writ.

15. The Court finds jurors did not rely upon outside materials when deciding what standard to follow in opposing the death penalty as alleged in Applicant's writ.

16. The Court finds the alleged "repeated and continuing misconduct" were instances of statements and arguments made by the State during the course of trial which were unobjected to at the time of trial.

CONCLUSIONS OF LAW

1. The sentencing jury was not precluded from considering and giving full effect to Applicant's mitigation evidence. Applicant did not present evidence that can be classified as mitigating such that Applicant would be less culpable than defendants who have no such excuse. Louis v. State, 815 S.W. 2d 560 (Tex.Crim.App. 1991); California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed. 2d 934.

2. This Court, under these circumstances, was under no obligation to give any special instructions concerning mitigation; the failure to do so, in Applicant's case, in no way denies a person's rights under the Eighth and Fourteenth Amendments. Clark v. State, (Cr.App. 1986) 717 S.W. 2d 910, certiorari denied 107 S.Ct. 2202, 481 U.S. 1059, 95 L.Ed. 2d 857; Belveu v. State, (Cr.App. 1989) 791 S.W. 2d 66, rehearing denied.

3. Article 37,071, V.A.C.C.P., is not subject to attack on the basis the Court of Criminal Appeals has no standard to determine the sufficiency of the evidence to support the special issues. Cantu, No. 70,739, Campbell, 6/3/92.

4. The Court concludes as a matter of law a single juror may give effect to his conclusion that the evidence does not warrant a sentence of death. The statue (Tex. Code Crim. Proc. Ann. art. 37.071(d) Vernon 1990) did not impermissibly deny Applicant a fair sentencing phase and an individualized determination of sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in similar provisions of Texas law.

5. The jury charge at the guilt phase did not relieve the prosecution of the obligation to prove every element of the crime beyond a reasonable doubt. The elements of this case were first charged in the abstract and then were included in the application paragraph; the charge included each and every element of the offense as required by law. Benson v. State, 661 S.W. 2d 716 (Tex. Crim. App. 1983); Kinnamon v. State, 791 S.W. 2d 84 (Tex.Crim.App. 1990); Buffington v. State, 801 S.W. 2d 151 (Tex.App. -- San Antonio 1990).

Additionally this claim is procedurally barred. Ex Parte Dutchover.

6. The Court concludes as a matter of law no definition of reasonable doubt was required at the time of this trial. The rule in Geesa v. State, 820 S.W. 2d 154 (Tex.Crim.App. 1991) does not apply to cases in which collateral review is sought after final conviction.

7. The special issues do not fail to distinguish who will receive the death penalty in a manner such that the death penalty is imposed in an arbitrary and capricious manner.

The specific question of whether the statute results in an arbitrary and capricious imposition of the death penalty has been previously answered in the negative. Smith v. State. 683 S.W. 2d 393 (Tex.Crim.App. 1984).

Further, the statute which provides for special issues to be answered, sufficiently narrows the class of persons eligible for the death penalty. Landry v. Lynaugh, C.A.5 (Tex.) 1988, 844 F.2d 1117, rehearing denied 844 F.2d 1122, certiorari denied 109 S.Ct. 248, 488 U.S. 900, 102 L.Ed.2d 236; Strutman v. Lynaugh, C.A. 5 (Tex.) 1988, 835 F.2d 1519; Gosch, No. 69,726, McCormick, 12/18/91. This claim for relief should be denied.

8. The admission of evidence of unadjudicated extraneous offenses did not, at the penalty phase of Applicant's trial, deny Applicant of any Constitutional protection. It is well established such evidence is admissible in Texas capital murder trials. Green v. State, 587 S.W.2d 167, 169 (Tex.Crim.App. 1979); Harris v. State, No. 70, 167 (Tex.Crim.App. April 22, 1992), slip op. 16; Gentry v. State, 770 S.W.2d 780, 793 (Tex.Crim.App. 1988).

9. The evidence is sufficient to support an affirmative answer to the second special issue. This claim is procedurally barred. Sufficiency of evidence may not be raised in collateral attack. Ex Parte Brown, 757 S.W.2d 367 (Tex.Crim.App. 1988); Ex parte Williams, 703 S.W.2d 647 (Tex. Crim.App. 1986).

10. The Court concludes as a matter of law Applicant received effective assistance of counsel at all stages of the pre-trial, voir dire and trial proceedings. This effective representation of counsel included adequate and effective investigation of matters relevant to both the guilt/innocence and punishment phases of trial.

11. The Court concludes as a matter of law Applicant did receive effective assistance of counsel on appeal.

The applicant has failed to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Signed this 22 day of February, 1993.

LEON F. PESEK, Judge of the
102nd District Court
Bowie County, Texas

A CERTIFIED COPY
ATTEST: DILLY FOX
District Clerk, Bowie County, Texas
February 22 19 93
By Deputy
VOL. 43F PAGE 132-138

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-40058

U.S. COURT OF APPEALS
FILED
SEP 23 2002
CHARLES R. FULBRUGE III
CLERK

DELMA BANKS, JR

Petitioner - Appellee-Cross-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent - Appellant-Cross-Appellee

Appeal from the United States District Court for the Eastern District of Texas, Texarkana

---

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

APPENDIX I

COPY

CAUSE NO. 80-F-086-102

THE STATE OF TEXAS | IN THE 102nd DISTRICT COURT

VS. | OF

DELMA BANKS, JR. | BOWIE COUNTY, TEXAS

DEATH WARRANT

TO THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS AT HUNTSVILLE, TEXAS, GREETINGS:

WHEREAS, on the 22nd day of September, 1980, A.D., in the 102nd District Court of Bowie County, Texas, **DELMA BANKS, JR.** was duly and legally convicted of the crime of Capital Murder, as fully appears in the Judgment of said court entered upon the minutes of said court, as follows, to-wit:

FILED FOR RECORD

1980 OCT AM 10 13

NO. 80-F-86

THE STATE OF TEXAS) IN THE DISTRICT COURT

VS.) OF BOWIE COUNTY, TEXAS

DELMA BANKS, JR.) 102ND JUDICIAL DISTRICT

CHARGE: Capital Murder DATE: July Term A.D., 1980

On the 22nd day of September, 1980, this cause was called for trial, and the State appeared by her District Attorney, Louis J. Raffaelli, and the Defendant, Delma Banks, Jr., appeared in person, in open Court, his counsel, Lynn Cooksey, also being present, whereupon both parties announced ready for trial and the said Defendant, Delma Banks, Jr., in open Court, pleaded not guilty to the charge contained in the indictment herein; thereupon a jury of good and lawful men and women, to-wit: Joe Allen Burns, foreman, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterward was brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the jury, find the defendant, Delma Banks, Jr., guilty of Capital Murder."

/s/ Joe Allen Burns

Whereupon, the Defendants elected to have his punishment affixed by the Jury, and the Jury, having heard all the evidence, and being duly charged by the Court, retired to consider its verdict and after due deliberation, returned into open Court, the following verdict, to-wit:

QUESTION NO. 1:

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, DELMA BANKS, JR., that caused the death of Richard Wayne Whitehead was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER "YES" OR "NO".

ANSWER: YES

QUESTION NO. 2:

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, DELMA BANKS, JR., would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER "YES" OR "NO".

ANSWER: YES

QUESTION NO. 3:

Do you find from the evidence beyond a reasonable doubt that if raised by the evidence, the conduct of the defendant in killing the deceased was unreasonable in response to the provation, if any, by the deceased?

ANSWER "YES" OR "NO".

ANSWER: YES

We, the jury, return in open court the above answers as our verdict in this cause.

/s/ Joe Allen Burns

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, Delma Banks, Jr., is guilty of the offense of Capital Murder as found by the jury, and that he be punished by Death, such sentence shall be suspended until the decision of the Texas Court of Criminal Appeals has been received in accordance with Article 42.04 in the Texas Code of Criminal Procedure, and that the said Defendant be remanded to the Texas Department of Corrections to await the further orders of the Court herein.

SIGNED THIS THE 10 day of October, 1980.

LEON F. PESEK, JUDGE
102nd JUDICIAL DISTRICT COURT
BOWIE COUNTY, TEXAS

A CERTIFIED COPY
ATTEST: BILLY FOX
District Clerk, Bowie County, Texas
October 4 2002
By Dana Sherman
Deputy
VOL 21F PAGE 18-19

AND

WHEREAS, on the 3rd day of October, 2002, the Court entered Order and set the date for execution now entered upon the minutes of said court as follows: to-wit:

NO. 80-F-086-102

FILED FOR RECORD
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BILLY FOX
DISTRICT CLERK BOWIE CO TX

THE STATE OF TEXAS	)(	IN THE 102ND DISTRICT COURT
Vs.	)(	OF
DELMA BANKS	)(	BOWIE COUNTY, TEXAS

ORDER SETTING EXECUTION DATE

Came on for consideration this date in open Court this cause, for the purpose of having the execution date pronounced in accordance with the verdict and judgment previously rendered herein and entered against the Defendant herein as a Mandate has now issued, accordingly;

IT IS THE ORDER OF THE COURT that the Defendant, **DELMA BANKS**, who has been adjudged to be guilty of Capital Murder, and whose punishment has been assessed by the verdict of the jury at death, shall, after the hour of 6:00 P.M. on Wednesday, the 12th day of March, 2003 at the State Penitentiary at Huntsville, Texas, be caused to die by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death into the body of said **DELMA BANKS**, until he is dead; and that the Clerk of this Court issue a death warrant in accordance with this sentence directed to the Warden of the State Penitentiary at Huntsville, Texas and any and all others entitled to notice.

ENTERED this 3 day of October, 2002.

LEON F. PESEK, Sitting for the
102nd Judicial District Court
Bowie County, Texas

A CERTIFIED COPY
ATTEST: BILLY FOX
District Clerk, Bowie County, Texas
October 4 20 02
BY Erma Sherman Deputy
VOL. PAGE

THESE ARE THERE TO COMMAND YOU to execute the aforesaid judgment and sentence at any time after the hour of 6:00 P.M. on **Wednesday, March 12, 2003,** at the state penitentiary at Huntsville, Texas, in the room arranged for the purpose by intravenous injection of a substance or substances in the lethal quantity sufficient to cause the death into the body of the said **DELMA BANKS, JR.** until he is dead.

HEREIN FAIL NOT, AND DUE RETURN MAKE HEREOF IN ACCORDANCE WITH LAW.

WITNESS MY SIGNATURE AND SEAL OF OFFICE on this the 8th day of October, 2002, in the city of New Boston, Bowie County, Texas.

BILLY FOX, District Clerk
Bowie County, Texas

BY Erma Sherman
ERMA SHERMAN, Chief Deputy

APPENDIX J

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eight Amendment to the Constitution provides in relevant part:

> nor cruel unusual punishments inflicted.

The Fourteenth Amendment to the Constitution provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2253(c)(2) provides in relevant part:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

EDITOR'S NOTE

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ISSUED.

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Supreme Court, U.S.
FILED
FEB 19 2003
CLERK

No. 02-8286

IN THE
SUPREME COURT OF THE UNITED STATES

DELMA BANKS, JR.
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

BARRY McBEE
First Assistant Attorney General

JAY KIMBROUGH
Deputy Attorney General
For Criminal Justice

GENA BUNN
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ATTORNEYS FOR RESPONDENT

* Counsel of Record

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:14 P.04

25 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED WHEN IT REJECTED PETITIONER'S ALLEGATION THAT PROSECUTORS HAD VIOLATED *BRADY v. MARYLAND* BECAUSE (1) THE EVIDENCE PRESENTED IN SUPPORT OF PETITIONER'S CLAIM WAS PROCEDURALLY BARRED FROM BEING CONSIDERED ON FEDERAL COLLATERAL REVIEW, AND (2) PETITIONER'S CLAIM WAS WITHOUT MERIT EVEN IF THE DEFAULTED EVIDENCE COULD BE CONSIDERED BY THE FEDERAL COURTS.

2. WHETHER THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT PETITIONER HAD FAILED TO DEMONSTRATE PREJUDICE STEMMING FROM HIS TRIAL ATTORNEY'S ALLEGEDLY DEFICIENT PERFORMANCE DURING PUNISHMENT PROCEEDINGS.

3. WHETHER THE LOWER COURTS ERRED BY REFUSING TO CONSIDER THE MERITS OF A CLAIM RAISED FOR THE FIRST TIME BEFORE THE FEDERAL DISTRICT COURT IN PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

4. WHETHER THE LOWER COURTS ERRED BY CONCLUDING THAT PETITIONER'S CLAIM UNDER *SWAIN v. ALABAMA* WAS BARRED FROM SUBSTANTIVE FEDERAL REVIEW BY AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL DEFAULT.

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II. Certiorari Review Of Banks' *Brady* Claim Is Unwarranted Because The Fifth Circuit Correctly Concluded That The Evidence Presented In Support Of Banks' Allegations Was Procedurally Barred From Being Considered On Federal Collateral Review. Moreover, The Lower Court Properly Found That Banks' Claim Was Without Merit Even If The Defaulted Evidence Could Be Considered By The Federal Courts In The First Instance. 8

A. The Court of Appeals correctly determined that Banks had failed to demonstrate "cause" to excuse both his failure to develop the facts supporting his *Brady* claim during state habeas proceedings, and his failure to exhaust his reliance on evidence first presented during federal collateral review. 9

B. In any event, the Fifth Circuit correctly found that Farr's status as a paid police informant was not "material" within the meaning of *Brady*. 15

1. Farr's testimony was adequately corroborated by other witnesses at trial. 16

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Delma Banks, Jr. ("Banks") is scheduled to be executed after 6:00 p.m. (CDT) on Wednesday, March 12, 2003, for the 1980 capital murder of sixteen-year-old Richard Wayne Whitehead. He now seeks certiorari review of the Fifth Circuit Court of Appeals' decision reversing the district court's partial grant of federal habeas corpus relief regarding two sentencing-phase issues and denying a Certificate of Appealability ("COA") on certain additional claims. However, as discussed below, the Court of Appeals applied established federal law and correctly concluded that Banks was not entitled to collateral relief. Banks does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals summarized the evidence presented during the guilt phase of Banks' trial as follows:

> The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash[, Texas,] on the morning of April 15, 1980. The deceased had been shot three times, twice in the head and once in the upper back. One shot had been fired at a maximum distance of eighteen to twenty-four inches. Near the scene several empty beer cans and two spent shell casings were found.
>
> Patricia Hicks testified that she was a friend of the deceased and that she was with the deceased during the evening of April 11, 1980. Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a black vinyl top, and red hood. During the course of the evening the pair were joined by [Banks] and at his suggestion beer was purchased. The three went to the park near Nash and drank beer. [Banks'] residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home.

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Patty Bungardt testified that [Banks] and the deceased visited her at her house around 11:30 p.m. on April 11. They stayed for approximately ten to fifteen minutes.

Mike Fisher testified that he lived about one hundred yards from the park in Nash. At approximately 4:00 a.m. on April 12, he heard two gun shots.

Charles Cook testified that he met [Banks] on the morning of April 12 in Dallas. [Banks] was driving a vehicle which had the same description as the deceased's. Cook and his wife befriended [Banks] and allowed him to stay with them at Cook's grandfather's home. Cook had noticed a sprinkle of blood on [Banks]'s pants and asked [Banks] about it. [Banks] told him that he had shot a white boy. Later that evening [Banks] told Cook that he had killed someone. [Banks] told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. [Banks] decided to kill the person for the hell of it and take his automobile to Dallas. Cook eventually obtained a pistol and the automobile from [Banks]. The pistol was later identified through ballistic testing as the murder weapon. [Banks] later returned to Texarkana by bus. Cook sold the pistol to his neighbor and took the automobile to West Dallas and left it. It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones.

Cook's wife and sister testified that they saw [Banks] driving a green Mustang on April 12. Cook's grandfather stated that [Banks] stayed at his house for a night or two. Cook's neighbor, Jones, also testified that he met [Banks] during the same time. [Banks] told him he had a little misunderstanding with someone and had broken his jaw or "something like that." [Banks] asked Jones "did I want to buy any iron, whatever, to make it back to Texarkana."

After the deceased's body was found [Banks] was placed under surveillance by law enforcement officers. On April 23 or 24 they observed [Banks], Marcus Jefferson, and Robert Farr, drive together from Texarkana to Dallas. [Banks] was driving the vehicle and after a few stops he eventually went to where Cook resided. The officers watched [Banks] leave the automobile, walk to the front door and then return to the automobile carrying an object. Jefferson and Farr testified that when [Banks] returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun.

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[Banks] did not testify and did not present any evidence.

Banks v. State, 643 S.W.2d 129, 131-32 (Tex. Crim. App. 1982).

II. Evidence Admitted During Punishment

The Fifth Circuit offered the following summary of punishment-phase evidence in its opinion below:

> *At the penalty phase,* the State presented two witnesses: [Robert] Farr and Vetrano Jefferson. Vetrano Jefferson was the brother of Banks' common-law wife and older brother of Marcus Jefferson (who had accompanied Banks and Farr to Dallas eight days after the victim was found).
>
> *Vetrano Jefferson testified* that, one week before the victim's death, Banks struck him (Vetrano Jefferson) with a pistol *and threatened to kill him.*
>
> *Farr testified* he, Banks, and Marcus Jefferson drove to Dallas so that Banks could reclaim his pistol to commit armed robberies and take care of any trouble that might arise during one.
>
> *As part of Banks' evidence,* two witnesses testified in order to discredit Farr: [*James*] *Kelley testified* he recently drove Farr to several doctors' offices to fill false prescriptions; and, *a former Arkansas police officer* [*Gary Owens*] *testified* Farr served as a paid informant in that State and was known to be unreliable.
>
> *Banks' parents and several acquaintances testified* that Banks was a respectful, churchgoing young man.
>
> And, *Banks testified.* Among other things, he stated it was his idea to obtain a gun so that Farr could commit armed robbery. And, he admitted striking Vetrano Jefferson with a gun and threatening to kill him.

See Petitioner's Appendix to Petition for Writ of Certiorari ("Appendix") A at 6-7 (emphasis in original).

III. Course of Proceedings and Disposition Below

In the fall of 1980, Banks was tried, convicted and sentenced to death in a Texas court

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for murdering Richard Whitehead during the course of a robbery. Tr 109-110.[1] His conviction and sentence were reviewed by the Texas Court of Criminal Appeals, which affirmed in a published opinion on November 3, 1982. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982). After the state court denied rehearing, *id.*, this Court declined certiorari review on October 11, 1983. *Banks v. Texas*, 464 U.S. 904 (1983).

On December 27, 1983, Banks filed what would be his first of three state habeas corpus applications challenging his conviction and death sentence.[2] *See Ex parte Banks*, No. 13,568-01 at 5. After holding an evidentiary hearing, the state habeas court entered findings of fact and conclusions of law recommending that Banks' application be denied. *Id.* at 13-14. The Court of Criminal Appeals then denied relief in an unpublished order on February 29, 1984. *Id.* at unpublished order of Feb. 29, 1984 (per curiam).

Banks filed his second state habeas application on May 2, 1984. *See Ex parte Banks*, No. 69,302 at 1. The state habeas court held an evidentiary hearing on Banks' claims and again recommended that relief be denied. *Id.* at 14. On September 26, 1984, the Court of Criminal Appeals issued an unpublished order denying Banks' application. *Id.* at unpublished order of Sept. 26, 1984 (per curiam). However, that order was later withdrawn and replaced with a published opinion rejecting Banks' state and federal claims. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989).

On January 13, 1992, Banks filed a third state habeas application raising seventeen

[1] "Tr" refers to the transcript of pleadings and documents filed with the court during Banks' state capital murder trial, followed by page numbers. "SR" refers to the transcribed record of trial proceedings, preceded by volume number and followed by page numbers.

[2] In 1993, Banks filed a fourth state writ application. However, that application did not raise a substantive challenge to Banks' conviction or death sentence, but rather asked the Court of Criminal Appeals to stay an evidentiary hearing scheduled to be held in conjunction with his third state habeas application. *See Ex parte Banks*, 13,568-04 (Tex. Crim. App. Mar. 22, 1993).

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claims for relief. 1 SHTr 76-222.[3] However, he later added additional allegations in two supplemental petitions filed in April and September of 1992. 2 SHTr 173-79; 3 SHTr 1-18. The state habeas court recommended that relief be denied on each of Banks' contentions, 5 SHTr 167-73, but the Court of Criminal Appeals remanded the case and ordered that the lower court hold an evidentiary hearing to resolve Banks' complaint that African American citizens had been systematically excluded from jury service in violation of *Swain v. Alabama*, 380 U.S. 202 (1965). 1st Supp. SHTr 6-7. On July 22, 1993, after holding a four day evidentiary hearing, the habeas court issued findings of fact and conclusions of law recommending that relief be denied. 2d Supp. SHTr 25-33. The Court of Criminal Appeals then denied relief in an unpublished order based on the trial court's findings and conclusions. *Ex parte Banks*, No. 13,568-03 (Tex. Crim. App. Jan. 10, 1996) (per curiam).

Following the denial of his state court appeals, Banks filed a federal habeas petition on March 7, 1996. *See* 1 R 1-63.[4] After holding an evidentiary hearing on Banks' claims, the federal magistrate judge recommended conditionally granting the writ based on her conclusions that (1) the prosecution improperly failed to disclose that a punishment phase witness had been a paid police informant, and (2) Banks' trial attorney had rendered ineffective assistance of counsel during punishment proceedings. *See* Appendix C at 21-25, 40-44, 54. On August 18, 2000, the district court adopted the magistrate's report with minor modifications and conditionally granted Banks relief from his death sentence. Appendix B

[3] "SHTr" refers to the transcript of pleadings and documents filed with the state court during proceedings on Banks' third state habeas application, proceeded by volume or supplemental transcript number and followed by page numbers. "SHR" refers to the evidentiary hearing held in conjunction with Banks' habeas application, preceded by volume number and followed by page numbers.

[4] "R" refers to the federal record on appeal, preceded by volume number and followed by page numbers.

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at 1-7. However, the court denied relief with respect to Banks' underlying capital murder conviction. *Id.* Banks later filed a motion to amend the judgment and a request for a COA on certain guilt-innocence issues, but each was denied by the district court. *See* 5 R 1209-17, 1231-49, 1263-66.

The Director subsequently appealed the district court's decision regarding Banks' sentence, and Banks cross-appealed seeking relief from his conviction. The United States Court of Appeals for the Fifth Circuit then reversed the lower court, rendered judgment in favor of the Director, and denied Banks a COA on his additional claims. *See* Appendix A. After the appellate court also denied Banks' motion for rehearing, he filed a timely petition for writ of certiorari with this Court on December 23, 2002.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Banks fails to advance a "compelling reason" for this Court to review his case, and none exists. Indeed, the opinion below involved a unanimous, unpublished decision by the Fifth Circuit panel, in which the appellate court merely applied established procedural and constitutional principles. *See* Appendix A. Accordingly, the petition presents no important question of federal law to justify the exercise of this Court's certiorari jurisdiction.

Moreover, because Banks filed his federal habeas petition in the district court on March 7, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") were not applicable to reviewing his federal claims. *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997) (amended provisions do not apply to habeas cases pending on April 24,

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1996, the effective date of the AEDPA). Instead, this case involves the standard of review that existed prior to the enactment of the AEDPA. As discussed below, the Court of Appeals properly applied a *de novo* review to the issues of law that served as the basis for the district court's partial grant of federal habeas relief and correctly found that the district court had erred in its application of law. The Fifth Circuit therefore properly reversed and rendered judgment in favor of the Director.

Finally, both the district court and the Court of Appeals correctly refused to issue Banks a COA on his claims that were denied by the district court. In particular, as a prerequisite to appellate review, Banks was required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal citations and quotation marks omitted). With regard to those claims wherein the district court denied relief on the merits, Banks was required to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* For claims denied on procedural grounds, Banks had to show that "jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis added). Because Banks did not meet these standards with regard to any of the claims denied by the district court, the courts below properly denied a COA. Consequently, certiorari review is not warranted in the instant case.

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II. Certiorari Review Of Banks' *Brady* Claim Is Unwarranted Because The Fifth Circuit Correctly Concluded That The Evidence Presented In Support Of Banks' Allegations Was Procedurally Barred From Being Considered On Federal Collateral Review. Moreover, The Lower Court Properly Found That Banks' Claim Was Without Merit Even If The Defaulted Evidence Could Be Considered By The Federal Courts In The First Instance.

In his first question presented for review, Banks complains that prosecutors violated this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that punishment-phase witness Robert Farr had been paid $200 to assist police in recovering Banks' handgun. *See* Petition at 24-29. He asserts that Farr's status as a paid police informant amounted to material impeachment evidence that, if provided to the defense, would likely have changed the outcome of his sentencing trial. *Id.* at 28-29. However, the Fifth Circuit correctly determined that Banks was not entitled to federal habeas corpus relief on this basis for three reasons. First, Banks neglected to develop any of the facts supporting his *Brady* claim during state habeas proceedings and failed to demonstrate sufficient cause to excuse his lack of diligence in state court pursuant to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See* Appendix A at 16-20. Second, assuming that Banks was entitled to a federal evidentiary hearing to develop his claim, the evidence the district court used to grant relief was unexhausted under 28 U.S.C. § 2254(b). *Id.* at 20-23. Again, Banks failed to prove cause and prejudice to excuse his failure to exhaust. *Id.* Finally, even if the unexhausted and defaulted evidence could be considered by the federal court in the first instance, it was not sufficient to demonstrate a reasonable probability that the result of Banks' sentencing trial would have been different if Farr's status had been disclosed. *Id.* at 26-33.

In the instant petition, Banks attacks the panel's decision with regard to both the procedural issues and the merits of his claim. Petition at 24-28. However, as discussed below, the Court of Appeals was correct in both respects and properly concluded that relief

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was unwarranted.

A. The Court of Appeals correctly determined that Banks had failed to demonstrate "cause" to excuse both his failure to develop the facts supporting his *Brady* claim during state habeas proceedings, and his failure to exhaust his reliance on evidence first presented during federal collateral review.

Banks does not dispute that his *Brady* claim is procedurally defaulted due to his failure to develop his allegations in the Texas courts, but instead asserts that the default must be excused based on the circumstances presented in his case. In *Keeney v. Tamayo-Reyes*, this Court held that the cause-and-prejudice standard is the appropriate measure for excusing a habeas petitioner's failure to develop material facts in state-court proceedings.[5] *See* 504 U.S. at 11. The Court also noted that such a rule is consistent with the federal exhaustion requirement:

> Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Id. at 10 (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)); *see also* 28 U.S.C. § 2254(b) (West 1995) (stating that federal court shall not grant a petition for writ of habeas corpus unless state prisoner "has exhausted the remedies available in the courts of the State"). Thus, under *Keeney*, Banks was only entitled to a federal evidentiary hearing to develop facts supporting his *Brady* claim if he could show cause for his failure to develop the facts in state-

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[5] The *Keeney* Court also announced a "narrow exception" to the cause-and-prejudice requirement where a habeas petitioner "can show that a fundamental miscarriage of justice would result from a failure to hold a federal evidentiary hearing." *Keeney*, 504 U.S. at 11-12 (citations omitted). However, Banks does not seek to take advantage of this exception in the instant petition.

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court proceedings and actual prejudice resulting from that failure.[6] *Id.* at 11. Similarly, under the rules of exhaustion and state procedural default,[7] Banks could not rely on material evidentiary support for his claim that was not presented in state-court proceedings unless he could meet the cause-and-prejudice requirements. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Keeney*, 504 U.S. at 10 ("Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful").

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply" with the relevant procedural requirements. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) ("For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim") (citations omitted). In this case, Banks argues that he was prevented from

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[6] This Court has analogized the *Keeney* "cause-and-prejudice" standard to the AEDPA's "diligence" standard for obtaining further factual development under 28 U.S.C. § 2254(e)(2). *See* (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 432-34 (2000) (holding that the "failure to develop" language of section 2254(e)(2), which generally precludes further factual development of a partially or wholly unexhausted claim in federal court, is a codification of *Keeney*'s cause-and-prejudice standard).

[7] Banks is procedurally barred from returning to state court to exhaust his factual allegations under Article 11.071, section 5(a), of the Texas Code of Criminal Procedure. That provision generally precludes a prisoner from litigating claims in a successive habeas application that could have been raised in previous applications. *See* TEX. CRIM. PROC. CODE ANN. art. 11.071 § 5(a) (Vernon Supp. 2002). It is well established that if a petitioner fails to exhaust state remedies and the court to which he would be required to return to meet the exhaustion requirement would now find the claim procedurally barred, then the claim is considered defaulted for the purposes of federal habeas corpus review unless the petitioner can either meet the cause-and-prejudice requirements or demonstrate a fundamental miscarriage of justice. *Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

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developing his claim during state-court proceedings because trial prosecutors (1) did not convey Farr's informant status to Banks' trial attorney despite their representation in a pretrial letter that they would voluntarily disclose any discoverable material without the need for extraneous litigation, and (2) failed to correct Farr's trial testimony when he suggested that he was not a police informant. Petition at 26-27. Relying on this Court's opinion in *Strickler v. Greene*, 527 U.S. 263 (1999), Banks contends that the concealment of Farr's status at his trial demonstrates "cause" to excuse his failure to present evidence supporting his *Brady* claim during state collateral review.[8] *See* Petition at 25-28. He argues that "if it was reasonable for trial counsel to . . . conclude [that Farr was not an informant], it was equally reasonable for habeas counsel to conclude similarly, as neither counsel nor Mr. Banks had any reasonable way to determine otherwise." *Id.* (footnote omitted).

However, Banks' argument neglects to note that his habeas attorney *alleged during state post-conviction proceedings that prosecutors had suppressed Farr's informant status*. Specifically, the record reveals that Banks asserted the following *Brady* claim in his third application for state habeas relief:

> Further, upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence as required by Brady v. Maryland, 363 U.S. 83 (1963). This evidence included . . . information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." . . . [T]he prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

---

[8] It should be noted that the focus of Banks' argument regarding cause has shifted significantly from that presented to the Court of Appeals. There, Banks tended to concentrate on his purported attempts to develop his complaint in the state habeas court, as well as on certain external impediments that allegedly prevented him from successfully litigating the claim in that forum. However, in the instant petition, Banks focuses almost exclusively on prosecutors' failure to disclose Farr's status *during trial proceedings* as cause for excusing his default. Aside from a short discussion in footnote 12 of his petition, Banks provides no mention of his efforts (or lack of effort) to develop his *Brady* claim on state collateral review.

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1 SHTr 137 at ¶ 114. Thus, unlike the circumstances presented in *Strickler*, Banks was clearly aware of the factual basis for his claim during state-court proceedings but then neglected to develop his allegations in any respect. *Compare Strickler*, 527 U.S. at 276-78, 282-89 (noting that petitioner did not become aware of factual basis for his *Brady* claim until federal habeas proceedings due to prosecution's incorrect representations in state court that all evidence had been disclosed pursuant to an "open file" policy, and concluding that prosecutor's actions were sufficient to demonstrate cause). Despite his belief that Farr was an informant, Banks did not seek discovery in state court or request investigative assistance to develop his allegation.[9] Indeed, even when Banks was granted an evidentiary hearing – a hearing at which both the trial prosecutor and Banks' defense counsel testified – he did not attempt to question or call witnesses to substantiate his *Brady* claim.[10]

Given these circumstances, Banks' case must be governed, not by *Strickler*, but by this Court's opinions in cases such as *Gray v. Netherland*, *supra*, and *McCleskey v. Zant*, *supra*. *See also Strickler*, 527 U.S. at 288 n.33 (declining to "reach, because it was not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of

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[9] In the Fifth Circuit, Banks asserted that he was prevented from exploring Farr's status in the Texas courts because the state habeas court never acted on his request for investigative assistance in the matter. However, as noted by the Fifth Circuit, the state court record reveals that Banks *never asked* for any assistance with regard to developing his allegations about Robert Farr. *See* Appendix A at 18-19. Instead, his requests in state court were limited to helping him develop a separate *Brady* claim regarding the testimony of Charles Cook. *Id.*; *see also* 4 SHTr 1-2.

[10] The evidentiary hearing ordered by the Court of Criminal Appeals was principally designed to provide Banks with an opportunity to present evidence regarding his *Swain* claim. 1st Supp. SHTr 8-10. Nevertheless, the trial court was also directed to "enter any further findings of fact. . . which it deems relevant to the disposition of this cause." *Id.* In spite of this order authorizing a broader inquiry, Banks never sought to present evidence regarding his *Brady* claim. Concomitantly, there is no evidence that the Texas courts prevented Banks from exploring issues surrounding Farr's status or from presenting evidence supporting his allegations.

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the documents in question and knew, or should have known, how to obtain them"). In both of those cases, the petitioner was previously aware of the factual basis for his claim but failed to raise it in a proper procedural manner. *See Gray*, 518 U.S. at 161 (failure to raise claim in state court); *McCleskey*, 499 U.S. at 498-99 (failure to raise claim in initial federal habeas petition). In both instances, this Court found that the claim was defaulted when raised on federal collateral review. *Gray*, 518 U.S. at 161; *McCleskey*, 499 U.S. at 497-503. It stands to reason that where a state habeas petitioner is aware of the factual basis for a *Brady* claim, and by reasonable means could have obtained evidence to support that claim, he must conduct "a reasonable and diligent investigation" at that time. *See McCleskey*, 499 U.S. at 498. In the instant case, Banks chose not to present any evidence to support his *Brady* claim in state court despite his knowledge of Farr's informant status, and instead waited until federal court litigation to present the written declarations of Robert Farr and the testimony of Deputy Willie Huff, who then confirmed Farr's status. In the absence of "'a showing of some external impediment *preventing* counsel from constructing or raising the claim'" during state post-conviction review, *id.* at 497 (emphasis in original) (quoting *Murray*, 477 U.S. at 492), Banks cannot show cause for defaulting his complaint.

Although Banks may be correct to assert that the events surrounding discovery at a criminal trial are "highly relevant" in resolving whether state habeas counsel was diligent in pursuing a *Brady* claim, *see* Petition at 26, it is not the only inquiry. In this case, regardless of what Banks' trial attorney knew, it does not excuse his habeas counsel from failing to conduct a "reasonable and diligent investigation" once he became aware of Farr's status. In other words, the prosecution's purported failure to disclose evidence *during trial proceedings* does not establish cause here because – in light of Banks' knowledge that Farr was a police informant at the time he filed his third state writ – any initial concealment would not have

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prevented him from fully litigating the claim during the state post-conviction proceeding. *Cf. McCleskey*, 499 U.S. at 502. For this reason, Banks' reliance on *Strickler* to attack the Fifth Circuit's decision is seriously misplaced. The Court of Appeals properly focused its inquiry on state habeas counsel's efforts to develop his *Brady* claim during the state litigation. There is no evidence that Banks' failure to develop the material facts of his claim at that time was the result of any "objective factor external to the defense [that] impeded counsel's efforts to comply" with the procedural rules.[11] Thus, the lower court correctly concluded that Banks had not demonstrated adequate cause to excuse both his failure to exhaust the material evidentiary support he presented to the federal magistrate judge and his

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[11] In footnote 12 of his petition, Banks briefly attempts to justify his lack of factual development during the state-court proceeding. For instance, he suggests that he "had no luck in finding Farr until six months after [his federal habeas] petition was filed." Petition at 27 n.12. He thereby implies that he actually made an effort to locate Farr prior to the federal litigation, obliquely suggesting that the crucial evidence was simply unavailable. However, it must be emphasized that Banks has never detailed *any* attempt to find Farr at the time of the state habeas proceeding despite ample opportunity in both the federal district court and the Court of Appeals. Because of this utter lack of evidence to support any kind of earlier investigation, the Fifth Circuit correctly found no such effort by Banks' attorneys. *See* Appendix A at 19 ("As for witnesses not coming forward until after the state court evidentiary hearing, Banks has not demonstrated that he attempted, even if unsuccessfully, to explore this issue, or any other issue, with those witnesses"). Indeed, by suggesting that the Fifth Circuit had "no support" for this finding, *see* Petition at 27 n.12, Banks seems to forget that it was *his burden* to demonstrate cause to excuse the procedural bar.

Banks also invokes Farr's May 1999 declaration filed with the federal court in which Farr proclaimed that he would not have spoken with Banks' attorneys prior to the fall of 1996. Petition at 27 n.12. However, as the Fifth Circuit observed, "[e]ven accepting Farr's statement as true, it does not justify Banks' not attempting to speak to Farr prior to the conclusion of the (three) State habeas proceedings." Appendix at 19. In other words, Banks cannot show diligence by simply suggesting that any investigatory effort would have been useless.

Finally, Banks complains that "Deputy Huff did not volunteer any information about Robert Farr," and did not reveal Farr's status until compelled to do so by the federal court. Petition at 27 n.12. However, this again misses the point. Banks never attempted to interview Huff– or any other investigating officer – during the state proceedings in an attempt to disclose Farr's status. Similarly, unlike his effort in federal court, he never sought to compel Huff's testimony during state post-conviction review. Thus, whatever reluctance Huff had to testify, it does not demonstrate that Banks diligently sought to investigate his claim in the Texas courts.

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failure to develop the factual basis of his *Brady* claim in the Texas courts.[12]

B. In any event, the Fifth Circuit correctly found that Farr's status as a paid police informant was not "material" within the meaning of *Brady*.

Even if Banks could establish cause to excuse the procedural default, his claim fails on its merits. It is, of course, well established that a prosecutor must disclose evidence to a criminal defendant if that evidence is favorable to the defendant and material to the defendant's guilt or punishment. *Strickler*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995); *United States v. Bagley*, 473 U.S. 667, 674-75 (1985); *Brady*, 373 U.S. at 87. Both impeachment evidence and exculpatory evidence fall within this general rule. *Bagley*, 473 U.S. at 676. To establish a constitutional violation based on a failure to disclose evidence, a habeas petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. *Strickler*, 527 U.S. at 281-82. This Court has explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Strickler*, 527 U.S. at 291 (emphasizing that petitioner must show a "reasonable *probability*," rather than a "reasonable *possibility*," of a different result in order to obtain relief under *Brady*) (emphasis in original); *Kyles*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict of confidence").

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[12] Additionally, as demonstrated in the following subsection discussing the "materiality" of Farr's status, Banks has failed to demonstrate "prejudice" sufficient to overcome any procedural default. *See Strickler*, 527 U.S. at 282 (stating that, unless non-disclosed materials "were 'material' for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default").

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The Fifth Circuit properly applied this "materiality" standard and determined that, even if Farr's informant status had been improperly concealed from the defense, the undisclosed evidence was not of such a character as to undermine confidence in the outcome of Banks' sentencing proceeding.[13] Appendix A at 26-33. The lower court correctly noted that Farr's testimony was adequately corroborated by other witnesses at trial, including by Banks himself. Additionally, the evidence had only minimal impeachment value in the context of the trial. The court therefore properly found that Banks' *Brady* claim was without merit.

1. Farr's testimony was adequately corroborated by other witnesses at trial.

During both guilt-innocence and punishment proceedings, Robert Farr testified that in late April 1980, he, Banks, and Marcus Jefferson traveled to the Dallas home of Charles "Two-two" Cook to retrieve Banks' pistol. 9 SR 2267-68; 10 SR 2499-500. Farr recalled that when they reached the house, Banks walked up to the porch and spoke to Cook for several minutes while he and Jefferson waited in the car. 9 SR 2268-69; 10 SR 2499-500. Banks then returned to the car and explained that Cook no longer had his gun and that Cook had instead provided him with a different pistol. 9 SR 2269; 10 SR 2500.

During the punishment phase of trial, Farr added additional context to this encounter that was relevant to Banks' future dangerousness. When asked about what they had intended to do with the gun, Farr answered, "I don't know. We were going to pull some robberies on

[13] Banks suggests that the Fifth Circuit's materiality analysis was contrary to this Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972). *See* Petition at 29. However, as noted by the Court of Appeals, *Giglio* involves a distinct constitutional claim from *Brady* and utilizes a different standard for assessing materiality. *See* Appendix at 29-30. The lower court properly distinguished between the two cases, noted that Banks had not raised a *Giglio* claim in either his state or federal habeas petitions, and applied the proper *Brady* standard in its opinion. *Id.* at 29-33.

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the way back [to Texarkana]." 10 SR 2502. He also added that Banks asked him whether the gun Cook had given him would "do," explaining that Banks asked this question because "the gun that we went after, it was a small type of gun and we needed a small type of gun" in order to conceal it. *Id.* at 2500-01. Finally, when asked whether he had inquired of Banks what would happen if there was any trouble "during those burglaries," Farr responded that "[Banks] said he would take care of it." *Id.* at 2503.

The details of this event were largely corroborated by the testimony of several other witnesses. For instance, Marcus Jefferson testified during the guilt phase of trial that he had driven to Dallas with Banks and Farr. 9 SR 2256-57. He recalled that when they got to Dallas, the three of them "just rode around. . . looking for a house." *Id.* at 2257. Jefferson stated that once they located the house, Banks walked up to the porch while he and Farr waited in the car. *Id.* at 2257-58. When Banks returned about five minutes later, he told them that "this Two-two dude gave him another gun. He didn't have [Banks' gun]. . . [Banks] said that Two-two said that some girl had [Banks'] gun, and so Two-two gave him another gun." *Id.* at 2264-65.

Charles "Two-two" Cook also provided testimony during the guilt phase of trial recalling Banks' attempts to retrieve the handgun. Cook stated that while Banks was staying at his house, Cook had taken Banks' gun and sold it to his neighbor. 9 SR 2299-2300, 2304-05. Cook testified that, later that week, Banks called him and asked if "I got rid of the car and where was that pistol, and I told him that I got rid of it." *Id.* at 2308. Banks called again early one morning and told him that he was not far from Cook's house and that he needed to come and talk to him. *Id.* at 2308-09. When Banks arrived, he told Cook that "he needed a pistol and he asked . . . where was his pistol." *Id.* at 2309.

Finally, Banks himself corroborated much of Farr's testimony when he took the stand

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during punishment proceedings. In his testimony, Banks recalled that Farr planned to commit "some robberies." 10 SR 2567. Although Banks claimed that he had not planned to personally participate in the robbery, he acknowledged that it was his "idea to go get the gun. . . . [s]o [Farr] could pull one." *Id.* at 2568; *see also id.* at 2571-73. Under cross-examination, Banks admitted that, in supplying the gun, he was "going to supply [Farr] the means and possible death weapon in an armed robbery case." *Id.* at 2573.

Thus, the record evidence strongly corroborates Farr's testimony regarding Banks' attempts to recover the handgun. Although Farr's testimony was certainly relevant to Banks' potential for future violence, any attempt by the defense to demonstrate that Farr was acting at the behest of police would have done little to undercut the State's case. *Cf. Strickler*, 527 U.S. at 294 (noting that record provided "strong support" for conclusion that petitioner would have been convicted of capital murder and sentenced to death even if identified witness had been severely impeached with *Brady* evidence). Specifically, even if the jury had known that Farr's story about committing robberies was a ruse to recover the weapon, Banks did not know that the robberies would not occur. Rather, he was under the impression that he was assisting Farr in securing the means to commit a violent crime, and his own testimony reveals that he was fully willing to do so. Consequently, the identified impeachment evidence was simply not of such a character as to "put the whole case in such a different light as to undermine confidence in the verdict."[14] *Kyles*, 514 U.S. at 435 (footnote omitted).

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[14] It warrants mentioning that, contrary to Banks' argument, Farr's testimony was not the "heart and soul of the state's case for the death penalty." *See* Petition at 28. Obviously, the most compelling evidence of future dangerousness was that Banks had brutally murdered Richard Whitehead in order to steal his car. The State also presented the testimony of Vetrano Jefferson that, only days before Whitehead's murder, Banks had pistol-whipped Jefferson and threatened to kill him. This evidence, combined with Farr's testimony, made up the State's case that Banks posed a continuing risk of future violence.

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2. Given the other evidence offered by the defense to impeach Farr's testimony, any additional impeachment material would have added little to the defense's case.

Moreover, the impeachment material identified in Banks' petition would have had little value in the context of his trial given the substantial material already offered by the defense to impeach Farr's credibility. In particular, during cross-examination by the defense at the punishment phase of trial, Farr denied (1) informing Officer Huff that he, Banks, and Jefferson were leaving for Dallas, 10 SR 2503-04; (2) going to Arkansas the previous week to obtain false prescriptions and getting into an altercation with a doctor who had refused to provide him with one, *id.* at 2504; (3) being a "snitch" for Arkansas narcotics officer Gary Owens, *id.* at 2509; and (4) that his wife had shot him. *Id.* at 2509-10.

However, during the sentencing trial, the defense presented the testimony of James Kelly, who contradicted Farr's account of events involving the Arkansas physician. Kelly testified that Farr had hired him to take him to Arkansas to get a prescription filled, and recalled that when they reached the hospital, Farr began "fussing" with a doctor over filling the prescription. 10 SR 2547-48. According to Kelly, the doctor then ordered Farr "to get his ass out of there." *Id.* Kelly also testified that, after Farr unsuccessfully attempted to obtain prescription drugs from several other hospitals in Arkansas, he indicated that he was determined to get the drugs before he returned to Texarkana. *Id.* at 2548-51.

Arkansas police officer Gary Owen also disputed portions of Farr's testimony. He indicated that he had known Farr from his duties and described Farr as a "doper." 10 SR 2557. He also opined that Farr was not a truthful person and that he was unworthy of belief. *Id.* at 2558. Owen indicated that he had used Farr as an informant on two or three occasions, but that Farr's information proved to be incorrect and he no longer used Farr. *Id.* at 2558-59.

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Also, during cross-examination by the defense at the guilt phase of trial, Farr admitted that he had been abusing the drug Dilaudid for seven years and that he had "track marks" on his arm as a result. 9 SR 2270-71. He also acknowledged that he had abused heroin, although he claimed that he stopped once he found a sufficient supply of Dilaudid. *Id.* at 2271. Finally, Farr admitted to smoking marijuana. *Id.* at 2274.

The Fifth Circuit correctly observed that the defense had successfully impeached Farr's credibility with this evidence. Indeed, to the extent that Farr's informant status had any additional impeachment value, it only contradicted Farr's testimony that he hadn't assisted Deputy Huff in his investigation. Such evidence would have been largely cumulative of the other impeachment evidence offered and would have added little to counsel's argument or examination. The lower court therefore was correct in its assessment that "Farr's paid informant status, when considered against the other impeachment evidence about him, and the fact that much of his testimony concerning the trip to Dallas to retrieve Banks' pistol was corroborated, does *not* present a reasonable probability that the jury would have found differently concerning Banks' future dangerousness." Appendix A at 33 (emphasis in original, citation omitted).

III. Certiorari Review Is Unwarranted On Banks' Sixth Amendment Claim Because The Fifth Circuit Correctly Determined That Banks Had Failed To Demonstrate Prejudice Stemming From His Trial Attorney's Allegedly Deficient Performance During Sentencing Proceedings.

In his second ground for review, Banks maintains that his trial attorney rendered ineffective assistance of counsel during punishment proceedings by failing to present mitigating evidence that Banks had suffered from a dysfunctional childhood and from certain psychological disorders. *See* Petition at 11-19, 30-33. The Court of Appeals rejected this allegation, finding that the evidence presented in support of Banks' claim – to the extent that

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it had been adequately exhausted during state-court proceedings – did not demonstrate a reasonable probability of a different sentencing verdict.[15] Appendix A at 36-40. In the instant petition, Banks faults the panel's decision for two reasons. First, he argues that the Court of Appeals failed to consider the cumulative effect of the omitted mitigating evidence when it conducted its prejudice analysis. Petition at 31-32. Second, he argues that "the mitigating evidence in this record is very similar in quantity and character" to that considered in (*Terry*) *Williams v. Taylor*, 529 U.S. 362 (2000), and that the Fifth Circuit erred by failing to heed this precedent. Petition at 31-33. However, as discussed below, each of these complaints is without merit and the lower court correctly concluded that habeas relief was unwarranted. Certiorari review should therefore be denied.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner bears the burden of satisfying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 688, 687 (1984). *See Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002); (*Terry*) *Williams*, 529 U.S. at 390. Specifically, *Strickland* requires him to show both (1) that counsel rendered deficient performance, and (2) that counsel's actions resulted in actual prejudice. *Strickland*, 466 U.S. at 687. To establish deficient performance, the petitioner must demonstrate that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation

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[15] In its order granting habeas relief, the district court had relied extensively on the federal hearing testimony of psychologist Dr. Mark Cunningham in concluding that trial counsel's performance had prejudiced Banks' defense. *See* Appendix C at 22-23. However, the Fifth Circuit correctly concluded that Dr. Cunningham's testimony was unexhausted and therefore could not be considered by the federal courts in the first instance. *See* Appendix A at 36-38. In particular, Dr. Cunningham's testimony constituted a "significant expansion of facts and opinions" from the psychological evidence Banks originally presented to the Texas courts. *Id.* at 38. Banks does not challenge this ruling in his certiorari petition. *See* Petition at 30-33. However, in his discussion of how the claim was raised below, he erroneously commingles both exhausted and unexhausted evidence in an apparent attempt to magnify the strength of his prejudice claim. *Id.* at 15.

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fell below an objective standard of reasonableness." *Id.* at 688-90. Second, even if counsel's representation was deficient, the petitioner must also affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 687. This "prejudice" prong requires the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As noted above, Banks' current complaint is limited to counsel's failure to present mitigating evidence regarding his troubled family history and his psychological profile. *See* Petition at 30-33. The available evidence supporting this claim was presented exclusively through the testimony of Banks' mother and father, and through the affidavits filed with the state courts by psychologist Dr. Gregorio Pina. However, as the Fifth Circuit found, this evidence did not amount to the kind of information that would have altered the jury's sentencing decision.

Of the evidence presented to the state courts, there is little to suggest that Banks suffered from any kind of sustained abuse during childhood.[16] During state habeas proceedings, Banks' mother reported that her husband "would get drunk and he would get angry and holler at me." 2 SHTr 7. However, not a single reference to physical abuse appears in her affidavit. Similarly, in Banks' father's affidavit, he mentioned only one instance of "harsh discipline" involving an episode where he tied Banks to a tree and "whipped him with a leather belt or strap" to discipline him for bullying other elementary

[16] As the Fifth Circuit noted, the only evidence of any kind of sustained abuse came from Dr. Cunningham's unexhausted testimony at the federal evidentiary hearing. *See* Appendix A at 36-38.

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school students and stealing their lunch money. 2 SHTr 14.

Also, Banks' parents' testimony at the federal evidentiary hearing added little to their previously-filed affidavits. Banks' father testified that in his "younger days" he had suffered from a drinking problem. 6 R 218-19. Although he admitted that he "used to get drunk every weekend," the elder Banks still maintained that his son was "a good boy," and that he had "raised him real nice." 6 R 217-18. Additionally, Banks' mother testified that Banks suffered from eczema since he was a baby, and that as a result he developed an "inferior complex." 6 R 227-29. She also confirmed that her husband had a drinking problem when Banks was growing up. 6 R 229. However, again, neither witness mentioned any instances of physical abuse or spousal cruelty at any point in their testimony. They also provided no detail about the effects that the elder Banks' "alcoholism" might have had on the family.[17]

Dr. Pina also provided scant evidence about any history of abuse in either of the two affidavits he filed with the Texas courts. Indeed, in his first affidavit, Pina made no mention of abuse of any kind. 2 SHTr 122-26. In an amended affidavit filed with the Court of Criminal Appeals, Dr. Pina asserted that Banks had been "beaten and traumatized by his alcoholic father," but then did not mention any specific incidents of abuse other than the tree-tying episode cited in the affidavit from Banks' father. *See* Amended Affidavit of Gregorio Pina, Ph.D. at 4. Instead, Dr. Pina concluded that Banks suffered the bulk of his childhood

[17] In fact, an examination of the trial record reveals that the testimony of Banks' mother and father differed little from that presented to the jury at trial. There, Banks' father testified during punishment proceedings that Banks was a "nice son" and begged the jury to spare his life because "he will do nobody no harm." 10 SR 2516. Similarly, Banks' mother stated that Banks was a "good boy," and that if the jury spared his life, he would be a good member of the community. 10 SR 2575-76. Thus, the record is clear that even federal habeas counsel could not coax any evidence from Banks' parents that was significantly more scandalous or lascivious than that which was presented to Banks' sentencing jury.

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trauma as the result of a "severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin." *Id.* Pina opined that this skin condition caused Banks "to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore," leading to impaired bonding with family and friends and to low self-esteem. *Id.* Additionally, Dr. Pina found that Banks had a "limited cognitive capacity and psychological impairment." *Id.* at 2. For instance, he noted that Banks full-scale IQ was measured between 81 and 85 on the Weschler Adult Intelligence Scale - Revised, and at 73 on the "Stanford-Binet IQ test." *Id.* 2-3. He also stated that his testing revealed "a mild and diffuse neurological impairment and a learning and language disability." *Id.* at 3. Finally, at the time Dr. Pina tested Banks on death row in 1993, he diagnosed him with "moderate to severe depression. . . complicated by feelings of extremely low self-esteem and an almost complete lack of self-worth." *Id.*

However, as the Fifth Circuit concluded, none of this evidence suggests a reasonable probability that the jury would have answered the sentencing phase issues in a different manner if they had been aware of these circumstances at Banks' trial.[18] At best, the omitted

[18] Banks' sentencing jury was asked to answer the following three special issues:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, DELMA BANKS, JR., that caused the death of Richard Wayne Whitehead was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, DELMA BANKS, JR., would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Do you find from the evidence beyond a reasonable doubt that if raised by the evidence, the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

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evidence was "double-edged," and could have easily led jurors to conclude that Banks' social and psychological history put him at an increased risk for future criminal behavior and violence. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). Certainly, the evidence would have provided ample ammunition for the prosecution to argue that Banks was unlikely to alter his violent conduct. Of course, this argument would have only been bolstered by referencing the brutal and senseless murder of Richard Whitehead and the fact that Banks later attempted to retrieve the murder weapon so that it could be used in future armed robberies. Additionally, the omitted evidence would have had little mitigating value in the context of Banks' trial. For instance, there is no significant difference between the "social history" developed during state habeas proceedings and the character evidence presented during the punishment phase of trial. What little additional information was produced regarding the tree-tying incident, Banks' skin condition, and his father's reported alcohol abuse, if relevant at all, "would barely have altered the sentencing profile presented to the [jury]." *Strickland*, 466 U.S. at 700. Such evidence simply would not have proved effective in mitigating Banks' moral culpability for Whitehead's death. Finally, in Banks' testimony during sentencing proceedings, he continued to adamantly deny any role in the offense, rendering the additional "mitigating" evidence virtually irrelevant. The Court of Appeals was therefore correct to conclude that the evidence presented during habeas proceedings did not create a reasonable probability of a different sentencing verdict.

Banks' attack on the Fifth Circuit's decision is without merit. Certainly, Banks is correct to assert that a federal court must view the evidence as a whole when evaluating prejudice under *Strickland*. *See* (*Terry*) *Williams*, 529 U.S. at 397-98. However, there is

Tr 102-03. The jury answered each of these issues in the affirmative, *id.*, resulting in an automatic death sentence under Texas law.

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nothing in the Fifth Circuit's opinion to show that the court did not follow this rule. For instance, the Court of Appeals cited the proper standard for gauging prejudice, *see* Appendix A at 34, and specifically observed that the evidence related to Banks' social and psychological histories was "related." *Id.* at 36. Although it is true that the lower court's opinion divides its discussion of this evidence into categories, this organizational device was simply meant to facilitate the court's analysis of whether Dr. Cunningham's testimony was adequately exhausted. *Id.* at 36-40. The court's opinion simply does not indicate that the court neglected to consider the totality of the mitigating evidence when it rendered its decision. Moreover, even if the court had considered the testimony of Banks' parents separately from Dr. Pina's affidavit, that testimony added nothing to the psychological evidence. Dr. Pina's affidavit specifically accounted for the allegations of abuse, paternal alcoholism, and Banks' skin condition, and the court discussed each of these factors in turn. The Fifth Circuit therefore did not fail to consider this evidence as a whole.

Additionally, contrary to Banks' assertions, the circumstances of Banks' case are entirely dissimilar to those presented to this Court in *Williams*. For instance, unlike the Virginia state court in that case, the Fifth Circuit applied the proper standard for evaluating prejudice under *Strickland*. *See* (*Terry*) *Williams*, 529 U.S. at 391-95. Also, the evidence presented by Banks is a far cry from the quantity and character of mitigating evidence presented in *Williams*. Despite Banks' allusions to the contrary, the evidence he presented during his habeas proceedings did not show the kind of "extensive records graphically describing [a] nightmarish childhood" that the *Williams* Court considered. *See id.* at 395 & n.19. In fact, as discussed above, Banks is only able to cite one incident of physical violence at the hands of his father, vague references to paternal alcoholism, and evidence that he suffered from childhood eczema. Similarly, Banks' allegations that he suffers from a low-

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average IQ, mild neurological impairment, and low self-esteem do not undermine confidence in his death sentence. In short, Banks fails to show any similarity to *Williams* and does not demonstrate any compelling reason for this Court to grant certiorari review.

IV. Certiorari Review Is Unwarranted On Banks' Claim That The Fifth Circuit Erred When It Concluded That The District Court Did Not Abuse Its Discretion By Declining To Consider A *Brady* Claim That Had Not Been Alleged In Banks' Federal Habeas Petition.

Banks next complains that the Court of Appeals erred when it declined to grant a COA to review the district court's decision refusing to consider a *Brady* claim alleged for the first time in Banks' proposed findings of fact and conclusions of law. *See* Petition at 33-36. For the purposes of his certiorari petition, Banks does not dispute that this *Brady* issue – which involved the alleged suppression of a transcript from a September 1980 interview with State's witness Charles Cook – was not raised in his federal petition for writ of habeas corpus or in any formal pleading intended to supplement or amend that petition.[19] However, he argues that the issue was "tried" by implied consent during the federal evidentiary hearing held in his case, and that the claim was therefore properly before the district court pursuant to Federal Rule of Civil Procedure 15(b). *Id.* He therefore urges this Court to grant certiorari review and hold explicitly that Rule 15(b) applies to evidentiary hearings that are held in conjunction with federal habeas corpus proceedings. *Id.* at 36.

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[19] Banks' federal habeas petition did raise a *Brady* claim alleging that the prosecution failed to disclose certain evidence that would have revealed a relationship between Cook and Farr, as well as evidence that would have revealed that Cook testified at Banks' trial pursuant to a "deal" to dismiss certain criminal charges that were pending against him in Dallas County. 1 R 46-47 at ¶ 152-53. In parts of his certiorari petition, Banks appears to suggest that any argument about the transcript – which did not touch on either of these previously raised issues – was subsumed within these claims. *See* Petition at 19-21. However, Banks does not offer any substantive argument on this basis, and instead simply concentrates on the Court of Appeals' refusal to apply Federal Rule of Civil Procedure 15(b). *Id.* at 33-36.

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This Court should decline to grant review in this case because the lower federal courts correctly concluded that Banks' *Brady* claim was not properly presented to the district court. Specifically, the record reveals that Banks did not raise any *Brady* allegations related to the non-disclosure of the Cook interview in his federal habeas petition. As both the Fifth Circuit and the district court observed, this failure could be fairly attributed to Banks' contention that he did not become aware of the transcript until it was provided to his attorneys during the discovery ordered by the federal magistrate judge. *See* 5 SR 1264; Appendix A at 52. However, even when Banks became aware of the interview, he did not seek to supplement or amend his federal writ petition to allege the transcript as a basis for habeas relief. Instead, he waited to allege a formal *Brady* claim based on the transcript for the first time in his proposed findings of fact and conclusions of law, 4 R 920-21, 930-31, and again in his objections to the magistrate's report and recommendation. 5 R 1183-86. When the district court did not address the claim in its order adopting the magistrate's recommendation, Banks filed a motion to alter or amend the judgment. *See* 5 R 1211-12. The district court denied this motion and refused to consider the merits of the claim, holding that "[i]ssues first argued by way of objections to a Magistrate Judge's findings and conclusions are not considered to be properly before the district court." 5 R 1265 (citing *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)).

In the Fifth Circuit, Banks argued for the first time that the district court's decisi refusing to consider his *Brady* claim ran afoul of Federal Rule of Civil Procedure 15(b). Brief for Petitioner-Appellee at 75, *Banks v. Cockrell*, No. 01-40058 (5th Cir. filed Jul 2001). He suggested – as he does in this Court – that the Director implicitly consen have the claim litigated when she did not raise a specific objection to the admissior transcript, or to questions about the transcript, during the federal evidentiary hear

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The Court of Appeals rejected this argument. Reviewing the district court's order for an abuse of discretion, the panel found that the district court correctly concluded that "Banks should have sought leave to amend his petition to add this claim." Appendix A at 52. It also affirmed the district court's conclusion that "issues first raised in objections to a report and recommendation are not properly before the district court." *Id.* (citing *Armstrong*, 951 F.2d at 630). Finally, the Court of Appeals observed that Banks "has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." *Id.* It therefore declined to grant a COA on Banks' claim that the district court erred by denying his Rule 59(e) motion. *Id.*

In the instant certiorari petition, Banks again fails to demonstrate that the district court abused its discretion by declining to review his belated *Brady* claim. The statue governing habeas proceedings provides that applications for a writ of habeas corpus "may be amended or supplemented as provided by the rules of procedure applicable to civil actions." 28 U.S.C. § 2242 (West 1995); *see also* Rule 11, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (West 1995) ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules"). Thus, Rules 15(a) and (d) of the Federal Rules of Civil Procedure specify how a petitioner may go about either amending or supplementing a federal writ. However, it is clear that Banks did not seek to take advantage of either of these provisions at any time during the federal court litigation.

Instead, on appeal, Banks seeks the shelter of Rule 15(b), which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." However, as noted by the Court of Appeals, there is simply no authority applying this rule – which by its terms

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is limited to a "trial" – to an evidentiary hearing held in conjunction with federal habeas proceedings.[20] Moreover, there are a number of reasons to refrain from applying the rule in the same manner as one might to a civil trial. For instance, the rules of evidence are frequently relaxed during such hearings, permitting a more liberal exploration of issues than might occur at a formal trial. Also, the absence of a formal pleading requirement in federal habeas proceedings would seriously impair the government's ability to assert valid procedural defenses that are unique to habeas law. For example, where a petitioner attempts to inject a new basis for relief at an evidentiary hearing without amending his complaint to specifically include the claim, the respondent would be handicapped in her ability to raise defenses such as exhaustion and procedural default. She would be reduced to parsing the record of the hearing and attempting to respond by speculating about how the petitioner intended to use the proffered evidence. Thus, the better rule in these circumstances is to require the petitioner to formally and timely designate the issues on which he seeks relief.

However, even if Rule 15(b) applied to federal habeas proceedings in general, the Court of Appeals correctly refused to utilize the rule in this case. Nothing about the record indicates that the Director consented – either implicitly or explicitly – to allowing Banks to amend his petition to include this *Brady* allegation. Indeed, she vigorously opposed allowing Banks to present any new, unexhausted evidence to the federal court, arguing that it was barred by *Keeney*, *supra*. The Director stated these objections in her written opposition to Banks' request for an evidentiary hearing, 2 R 560-82, in her objections to the court's order setting a hearing, 2 R 593-97, during the hearing itself, 6 R 9-10, in her post-hearing brief, 3 R 804-14, and in her objections to the magistrate's report and recommendation. 5 R 1146-48. Thus, Banks' suggestion that this issue was tried by "consent" is belied by the record. In the absence of the Director's consent to try the issue, Banks may not be freed from the requirement that he formally supplement or amend his habeas petition pursuant to Rules 15(a) or (d).

[20] As Banks concedes, this Court's opinions in *Harris v. Nelson*, 392 U.S. 286 (1969), and *Withrow v. Williams*, 509 U.S. 680 (1993), did not hold that Rule 15(b) applied to an evidentiary hearing in a federal habeas proceeding. It should also be noted that Banks did not cite either case in his briefing before the lower federal courts.

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V. Certiorari Review Is Unwarranted On Banks' *Swain* Claim Because The Fifth Circuit Correctly Found The Claim To Be Procedurally Defaulted.

Finally, Banks maintains that Bowie County prosecutors used peremptory challenges to systematically exclude black citizens from all criminal juries in the county over the preceding five years. Petition at 38-40. This practice, he contends, violates the Equal Protection Clause pursuant to *Swain v. Alabama*, 380 U.S. 202 (1965).[21] The Fifth Circuit, like the district court, found the claim to be procedurally barred on federal habeas review and thus denied a COA. *See* Appendix A at 63-74. As the court explained, Banks failed to comply with Texas' contemporaneous objection rule in the trial court, and the state court explicitly relied on this firmly established state procedural bar to dispose of the claim. *Id.* Moreover, the court held, even if Banks demonstrated cause for the default arising from trial counsel's failure to object on *Swain* grounds, he could not establish prejudice to overcome the procedural bar. *Id.* at 74. Banks now asks this Court for review, arguing that the Fifth Circuit's procedural default analysis was erroneous. Because it was not, he fails to present this Court with a compelling reason to review this issue.

Where the last state court judgment relies upon a state procedural bar, that judgment

[21] *Swain* was overruled in part by *Batson v. Kentucky*, 476 U.S. 79 (1986). Because his trial took place before *Batson* was decided, and because he presents his claim on collateral review, Banks cannot take advantage of *Batson*. *See Allen v. Hardy*, 478 U.S. 255, 258 (1986).

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rests on a state law ground that is independent of the federal question and adequate to support the judgment, thus precluding federal habeas relief.[22] *See Lee v. Kemna*, 534 U.S. 362, 336 (2002); *Coleman*, 501 U.S. at 729-30; *Harris v. Reed*, 489 U.S. 255, 264 (1989). Federal courts must honor the application of an adequate and independent state procedural bar even if the state court reaches the merits of the claim in the alternative. *Harris*, 489 U.S. at 264 n.10. To apply this rule of procedural default to a federal habeas petitioner, the state court's procedural rule must be firmly established and followed regularly by the state courts on similar claims. *See Lee*, 534 U.S. at 336; *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). The state court decision must also clearly and expressly rely upon the rule. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Once the clarity and regularity of the state procedural rule are established, a petitioner can overcome the bar to federal relief only by showing cause and prejudice for the default, or that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

A. The Texas contemporaneous objection rule is firmly established and applied regularly to similar claims.

Here, it is undisputed that Banks failed to object on equal protection grounds to the racial composition of the jury venire. Banks' certiorari petition also does not dispute that the State raised Banks' failure to object as a ground for disposing of the claim in both the stat and federal courts. Rather, Banks asserts that Texas did not consistently apply i

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[22] Although Banks raised this claim in his first state writ proceeding, in which the s court disposed of it on the merits, the cases indicate that the *last* state court judgment is contro in determining whether a procedural bar applies. *See Ylst v. Nunnemaker*, 501 U.S.797, 801 (1 Here, the last state court judgment on this issue came on Banks' third state writ, in which the applied a state procedural bar for failure to object. 2d Supp. SHTr 28 at ¶ 16.

contemporaneous objection rule to *Swain* claims at the time of his trial. Petition at 36-38.

This Court has recognized that a defendant may forfeit a *Swain* claim if the defendant fails to properly raise or preserve his complaint in the trial court. *See, e.g., Teague v. Lane*, 489 U.S. 288, 297 (1989) (holding that petitioner procedurally defaulted his *Swain* claim on federal habeas because he did not object or otherwise raise the issue at trial or on direct appeal). To properly preserve an equal protection objection to race-based peremptory challenges under *Swain*, a defendant must at least bring the claim to the trial court's attention by way of an objection or motion referencing the Fourteenth Amendment or *Swain* itself, or referring to a historical practice of racial bias in the exercise of peremptories. *Trevino v. Texas*, 503 U.S. 562, 566-67 (1992); *Ford v. Georgia*, 498 U.S. 411, 420-21 (1991). Thus, though the equal protection objection need not be artful, a complete failure to challenge *in any form* the state's exclusion of black jurors through the use of peremptory challenges implicates a state's contemporaneous objection or preservation requirements. Importantly, many federal courts have applied a state's contemporaneous objection rule to claims substantially similar to the *Swain* claim asserted here, and have recognized that *Swain* provided defendants with the means to raise a *Batson*-type claim prior to *Batson's* date of decision.[23] *See, e.g., McCrory v. Henderson*, 82 F.3d 1243, 1250 & n.7 (2d Cir. 1996)

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[23] Banks' attempt to distinguish *Batson*-type objections from *Swain*-type objections is unavailing for procedural default purposes. Failure to follow a state procedural rule that is regularly applied to *similar* claims precludes federal habeas relief. *See Hathorn*, 457 U.S. at 263. It cannot be seriously disputed that *Batson* claims are substantially similar to *Swain* claims. *See Ford*, 498 U.S. at 420 ("*Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim"). Moreover, attorneys in other *Swain*-era cases have made strategic decisions to lodge objections in some form at trial to the State's historical exclusion of black venire members. *See id; Trevino*, 503 U.S. at 567. Banks offers no reason why counsel could not have done so in his case.

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(holding that petitioner was procedurally barred for failure to object to prosecution's use of race in peremptory challenges, even though *Swain*, not *Batson*, was law at the time of trial); *Jones v. Butler*, 864 F.2d 348, 364 (5th Cir. 1988) (holding that petitioner who was tried before *Batson* could have objected to race-based peremptories under *Swain*, and failure to do so cannot be excused); *Teague v. Lane*, 820 F.2d 832, 834 n.6 (7th Cir. 1987) (holding that petitioner was procedurally barred from raising *Swain* violation where he failed to raise *Swain* claim in state court); *Wright v. Hopper*, 169 F.3d 695, 709 (11th Cir. 1999) (holding that *Swain* claims can be procedurally defaulted for failure to object).

As the Fifth Circuit has repeatedly recognized, the Texas contemporaneous objection rule is firmly established and regularly followed, and failure to comply with it is a sufficient basis for denying federal habeas relief. *See, e.g., Hogue v. Johnson*, 131 F.3d 466, 487 (5th Cir. 1997). Texas courts apply the rule to constitutional claims generally, *see, e.g., Ex Parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974); more specifically, to claims regarding the selection of the jury; and, even more specifically, to a prosecutor's race-based peremptory challenges in the pre-*Batson* era.

For example, in *Lopez v. State*, 437 S.W.2d 268, 269 (Tex. Crim. App. 1968), the Texas Court of Criminal Appeals explained that, where the defendant failed to object at the time of trial to the manner of jury selection, he was "not entitled to complain, for the first time in his motion for a new trial, of the manner in which the jury panel was selected." Similarly, in *Singleton v. State*, 346 S.W.2d 328, 330 (Tex. Crim. App. 1961), the court found that the defendant, who believed the method of jury selection in his case was influenced by the race of potential jurors, did not object to irregularities in selection of the venire, "*as is required by the holdings of this Court.*" (emphasis added). Indeed, as early as 1976, the Fifth Circuit also recognized that Texas procedural law required a timely objection

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to the racial composition of both the petit jury array and the actual petit jury; thus, failure to object barred such a claim on federal habeas review. *Cunningham v. Estelle*, 536 F.2d 82, 83-84 (5th Cir. 1976).

More specific developments followed. In *Chambers v. State*, the Court of Criminal Appeals broadly stated that "failure to object to the constitutionally improper exclusion of veniremen waives that right and such exclusion cannot be considered on appeal," absent a showing that the claim is new or novel. 568 S.W.2d 313, 319 (Tex. Crim. App. 1978), *overruled on other grounds by Grijalva v. State*, 614 S.W.2d 420 (Tex. Crim. App. 1980). It was unclear in *Chambers* whether the court was applying its statement to *Swain* claims specifically.[24] However, the court clarified its view in *Williams v. State*, which held that failure to object to the improper exclusion of black venire members waived error on appeal, where the defendant was tried in the *Swain* era, *before Batson* was decided. 773 S.W.2d 525, 534-35 (Tex. Crim. App. 1988). Even though *Batson* altered *Swain's* evidentiary burden, the court held, *Swain's* recognition of a potential equal protection challenge defeated the argument that such objections were novel and not previously available; thus, failure to object to the State's peremptory challenges could not be excused on this basis. *Id.* Also, in *Mathews v. State*, where the defendant's trial also took place in the *Swain*/pre-*Batson* era, the court recognized, "[t]hat purposeful discrimination by the State through use of peremptories

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[24] *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), upon which Banks relies, Petition at 37, does not save Banks' claim. *Haliburton* merely stated in a footnote that "we cannot say prior to applicant's evidentiary hearing that he needed to object at trial in order to preserve error." *Id.* at 135 n. 5. This equivocal statement hardly serves to prove Banks' claim that the contemporaneous objection rule does not apply. Moreover, as the Fifth Circuit has recognized, "an occasional act of grace by the Texas court in entertaining the merits of a claim that might have been viewed as waived by procedural default" does not constitute a failure to regularly follow the state's contemporaneous objection rule. *Hogue*, 131 F.3d at 487.

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o strike Blacks from the jury venire violates the Fourteenth Amendment has already been set forth in *Swain v. Alabama*." 768 S.W.2d 731, 733 (Tex. Crim. App. 1989). Any such claim was not "so novel that appellant's failure to object may be excused." *Id.*; *cf. Reed v. Ross*, 468 U.S. 1, 16 (1984) (holding that failure to raise a claim in accordance with state procedures will be cause to avoid a procedural bar on federal habeas review where the "constitutional claim is so novel that its legal basis was not reasonably available to counsel"); *Byrd v. Armontrout*, 880 F.2d 1, 7 n.6 (8th Cir. 1989) (finding that petitioner's *Swain* claim was not "novel" under *Reed* because "the legal framework for a discrimination claim under *Swain* had been in place for over twenty years at the time Byrd was pursuing state post-conviction relief").

The cases thus evince a rule of law that can be demonstrated with a simple syllogism: (1) claims regarding the race-based exclusion of black venire members are subject to Texas' firmly established contemporaneous objection rule; (2) *Swain* claims are claims regarding the race-based exclusion of black venire members; (3) therefore, *Swain* claims are subject to the contemporaneous objection rule. Because Banks failed to object, and because the last state court judgment explicitly relied on Banks' failure to object in disposing of the *Swain* claim, the Fifth Circuit correctly found the claim to be procedurally barred on federal habeas.

B. Banks failed to demonstrate cause and prejudice.

Banks also argues that the Fifth Circuit erroneously concluded that, although counsel's failure to raise the *Swain* claim *may* have constituted cause for the procedural default, Banks did not establish prejudice. Petition at 38. The Fifth Circuit explained that trial counsel, a former district attorney, "had an erroneous view of the *Swain* burden of proof." *Banks*, slip op. at 72. The court then noted the Director's argument that "determined that a *Swain* objection would be frivolous and unsuccessful

Supreme Court, U.S.
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No. 02-8286 (5)

IN THE SUPREME COURT OF THE UNITED STATES

DELMA BANKS, Jr.,
Petitioner,

-vs-

JANIE COCKRELL, Director,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO DIRECTOR'S OPPOSITION

An Execution Date Is Set For March 12, 2003.

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ARGUMENT

The Director urges the Court to turn Mr. Banks' petition away and allow his execution on March 12 because the petition presents no issue worthy of review. This view is mistaken. The fact remains that the panel below *reversed* the grant of relief on the two independent grounds ordered by the district court only by ignoring governing law from this Court, and refused to grant a Certificate of Appealability (herein COA) on two additional meritorious claims by conflating COA and merits review, just as the same court did in *Miller-el v. Cockrell*, No. 01-7662 (Feb. 25, 2003). Certiorari is appropriate in these circumstances.

Claim #1
Suppression of Key Penalty Phase Witness
Farr's Paid Informant Status

The Director asks the Court to deny review of this issue because the panel's overturning of relief is based upon the straightforward application of governing precedents and because it would have mattered little to the jury to learn that the State's key witness, Robert Farr, was a paid police informant. Each of these assertions is mistaken.

a. *If Mr. Banks Defaulted The Evidence That Shows This Claim to be Meritorious, He Shows Ample Cause*

The Director attempts to distinguish this case from *Strickler v. Greene*, 527 U.S. 263 (1999), by arguing that Mr. Banks could, or should, have been able to present his evidence in support of this claim in the habeas proceeding held in 1992 and 1993. While the Director is correct that Mr. Banks asserted the legal claim – he pleaded that, upon information and belief – the State had suppressed the fact that Robert Farr, its key penalty phase witness, was a paid informant and had set Mr. Banks up – he is mistaken in asserting that Mr. Banks defaulted federal review when he failed to present his supporting facts in that proceeding.

The record shows clearly that Mr. Banks made repeated attempts to discover whether Mr. Farr was a paid informant in this case. During a pretrial hearing, he asked the lead investigator to reveal the identity of the informant; the witness refused to do so. Pet. RE at Tab I at 24-25.[1] Prior to trial, the prosecutors assured counsel they would reveal all discoverable material without need for a formal motion. 1 SR at 13. They did not provide counsel with the name of the paid informant. During trial, counsel asked Mr. Farr before the jury if he was a paid informant. 9 SR at 2274. Farr denied that he was. *Id.* The prosecutors did not correct this misrepresentation, and in closing argument told the jury (and counsel) that Farr's testimony had been completely truthful. 10 SR at 2450.

Thus, in the trial proceedings, unlike in *Strickler* where there were no express representations concerning the later discovered impeachment materials, defense counsel here pointedly asked both the investigator and the witness to identify the informant in this case. The investigator refused to identify Farr as the informant, and Farr lied when he denied he was the informant. The prosecutors vouched for Farr's misrepresentation in their closing remarks. Given all of this, it was entirely reasonable for Mr. Banks and counsel to conclude that whomever the paid informant was, if there was one, it was *not* Robert Farr.

In state habeas proceedings, to make sure he did not waive any claim, Mr. Banks asserted, upon information and belief, that Farr was the informant. The attorney who filed the answer for the State was one of the two trial prosecutors. He was obliged to respond truthfully and accurately and

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[1] "R" refers to the original record on appeal, preceded by a volume number and followed by a page reference. "Pet. RE" refers to Petitioner's record excerpts. "Resp. RE" refers to Respondent's record excerpts. "Tr." refers to the transcript of the federal habeas hearing. "SHTr" refers to the transcript of the third habeas hearing.

confirm that, yes, Farr was, after all, the paid informant in this case. *See United States v. Messanatto*, 513 U.S. 196, 210 (1995). He did no such thing. He simply ignored the claim while providing detailed responses to each and every other claim pleaded in the petition. The state habeas court did not direct the State to respond to his claim, it refused to hold an evidentiary hearing where Mr. Banks could have subpoenaed the investigator and Farr and required them to testify, and denied the petition without addressing or acknowledging the claim. *See* App. E & D.

It stands comity on its head to assert, as the Director does, that, given all of this, it is Mr. Banks' fault that this claim, *and its supporting facts*, were not fully presented to the state courts prior to Mr. Banks seeking federal habeas relief. The Director makes no claim that Farr's paid informant status was not something the trial prosecutors were obliged to disclose; indeed, it was significant impeachment material. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966).

The principal teaching of *Strickler* is that state habeas counsel's duty to investigate *Brady* claims is informed by the representations of the prosecutor. Here, the prosecutors had explicitly denied that Farr was a paid informant.[2]

Moreover, the record is clear that the witnesses whose testimony in the federal hearing below demonstrated the merit of this claim – Robert Farr, Deputy Sheriff Huff, and Assistant District Attorney Elliott – were not available to Mr. Banks before the federal hearing below. Farr's declaration is clear on this point. He stated that shortly after his testimony in Mr. Banks' trial, he was told by his law enforcement handlers that his safety was in jeopardy if he remained in the

[2] Thus, the two cases upon which the Director relies, *Gray v. Netherland*, 518 U.S. 152 (1996) and *McCleskey v. Zant*, 499 U.S. 467 (1991), are not on point as in both "the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier." *See Strickler*, 527 U.S. at 287.

Texarkana area. Tr. Ex. B-1 at 2. He thus fled Texarkana, went first to Oklahoma and then to California to hide so he could not be found by those – like Mr. Banks – who he testified against. *Id.* He further said that he would not have spoken to anyone representing Mr. Banks until the fall of 1996, three and one years *after* the state habeas court rejected this claim.[3] *Id.* Deputy Huff was a hostile witness to Mr. Banks and revealed that he had paid Farr only when he was under oath at the hearing, and only after he was first assured by the magistrate judge that he could reveal that information. Tr. at 86. Finally, while counsel for Mr. Banks had some contact with Mr. Elliott during state habeas proceedings, Elliott never revealed that Farr was a paid informant.[4]

The record could not show more clearly that Mr. Banks wanted to litigate Mr. Farr's paid informant status in the trial court and again in the state post-conviction court, but at each turn was stymied by suppression, misrepresentation and silence. Had the panel below acknowledged *Strickler* and its teachings, it could never have reversed the district court's reasoned judgment that this claim *and* its supporting evidence were properly before the Court.

b. *The Director, like the Panel Below, Asks and Answers the Wrong Question Concerning Materiality*

The Director gamely argues that the suppression of Farr's informant status does not show a reasonable probability of a different sentencing result because Farr's penalty phase testimony was otherwise corroborated and he was impeached by other witnesses. These arguments miss the point because the important question is whether the missing "evidence could reasonably be taken to put

[3] In the district court, the Director made no effort to dispute these assertions and the court found them credible.

[4] The Director's assertion that Mr. Banks could have obtained this information if he had moved for discovery is also mistaken. Because of the States's suppression of evidence, Mr. Banks was denied the means to request such discovery on a good faith basis.

the whole case in a different light so as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

1. *Farr's Critical Testimony on Future Dangerousness Was Corroborated by No One*

The Director is correct that other witnesses testified to the facts, also supplied by Farr, that Farr, Mr. Banks, and another witness traveled to Dallas to obtain a weapon. That fact is entirely uncontroversial and was not in dispute. But Farr did provide the smoking gun for the prosecution's case for a capital sentence.

Farr told the jury that Mr. Banks' motive for going to Dallas was to secure a weapon. 10 SR at 2500-02. Farr testified that Banks sought a weapon so that he could (1) commit armed robberies, and (2) execute victims of those robberies, if necessary. *Id.* No other witness provided such testimony, and Mr. Banks denied such intent during this penalty phase testimony. 10 SR at 2566-69.

The importance of these assertions to the State's case for a capital sentence is found in the closing argument of the prosecution. When the prosecutor was explaining that a capital sentence could not be returned unless the jury unanimously found that Mr. Banks would likely commit other acts of violence in the future, he relied *solely* upon these assertions by Farr, and no other evidence. *Id.* at 2589.

Neither the Director nor the panel below acknowledges the central role this critical testimony played in the trial prosecutor's game plan to obtain a death verdict.

2. *The Other Forms of Impeachment Were Indirect and Pale In Comparison*

Finally, the Director asserts that because Farr was impeached with testimony that (1) he was a paid informant in another state, and (2) used fraud to obtain prescription drugs, acknowledgment

of his paid informant status in this case would have added little to reducing the jury's confidence in his credibility.

Neither of these impeachment grounds, if they were believed by the jury,[5] come within a country mile of establishing that Farr's involvement in this very proceeding was tainted by money and other inducements provided by the State. By suppressing Farr's paid informant status, the prosecutors were able to present Farr as an entirely disinterested witness.

Farr's testimony establishes beyond question that Mr. Banks' case for a life sentence was egregiously prejudiced by the suppression of Farr's true relationship with law enforcement in this case. It shows he set out to manipulate the younger Mr. Banks – for money and the promise that he himself would not be arrested on drug charges – and that his critical testimony about Mr. Banks' motive to obtain a gun – so that Mr. Banks could commit acts of violence in the future – had no basis in fact but was an invention by Farr.

What counts most when determining the likely effect of withheld evidence is not a barely plausible post-hoc explanation, but the prosecution game plan actually employed to persuade the jury to vote for a finding of future dangerousness. The record here leaves no doubt that the trial prosecutors viewed Mr. Farr's now recanted tale that Mr. Banks wished to obtain the gun to rob and kill others as their best evidence for a capital sentence.

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[5] The witness who testified that Farr was obtaining prescription drugs fraudulently, by his own admission, was drunk when he testified. *See* Tr. at 233. The witness who testified about Farr's informant status in Arkansas was shown to have a possible interest in going to work with the defense investigator in this case. 10 SR 2557-58. There is no assurance that the jury accepted, or placed much weight, on the testimony of either witness.

Claim #2
The Panel Below Never Considered In Its Entirety
The Mitigating Evidence Properly in The Record

The Director argues that even though the panel below reviewed the mitigating evidence in distinct groupings and never collectively, its decision reversing the grant of relief on this claim is faithful to *Williams v. Taylor*, 529 U.S. 362 (2000). Moreover, it argues that denial of relief is warranted because Mr. Banks' evidence is less compelling than that found in the *Williams* record. These views are misplaced.

This Court has made clear that when a reviewing court has before it a serious ineffective assistance claim – as this one is – analysis of the likely effect of counsel's errors and omissions requires a consideration of the entire record. Among other things, all the new mitigating evidence not presented to the jury must be placed against the State's case for a capital sentence, and the court must determine whether it is reasonably likely that if the jury heard the new evidence, it likely would have reached a different result. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Williams v. Taylor*, *supra* at 363. The panel failed to engage in that critical analysis, and instead weighed the mitigation in pieces against the record. The Director points to no place in the panel decision where it collectively weighed the evidence.

The Director also errs by focusing almost exclusively upon showing that Mr. Banks' mitigation is sufficiently less compelling than the mitigation offered in *Williams*. When all relevant factors are considered, it is clear that the district court properly found a meritorious claim.

First, with regard to the mitigating evidence, Mr. Banks proffered in the state court much of the evidence that he presented before the magistrate judge at the federal hearing. The state court held no hearing and made no findings. Because of this complete absence of findings, the district

court, following a long line of cases, properly granted an evidentiary hearing on this issue, heard from a number of witnesses, and granted relief based upon that record.[6] The panel below determined that only the evidence proffered in the state court was available and ruled that any "new" evidence was unexhausted and could not be considered.[7] Nevertheless, the proffered evidence alone presented substantial mitigating evidence, and is quite similar in character and kind to that in *Williams*. *See* Petition for Writ of Certiorari at 32.

The Director, like the panel, simply states that such evidence is insufficient to demonstrate the likelihood of a different result. But as the district court found, it was sufficient when considered against the other relevant record factors. Unlike the defendant in *Williams*, Mr. Banks had no prior convictions; Williams had a substantial history of violent criminal conduct. Moreover, the only evidence supporting future dangerousness aside from the crime – the testimony of penalty phase witnesses Vetrano Jefferson and Robert Farr – has been credibly recanted by those witnesses. And as this case is not governed by the AEDPA amendments, the district court could find relief was appropriate without also having to find that a state court decision to the contrary was objectively unreasonable, as was the case in *Williams*.

Unlike the panel and the Director, the only court that has properly reviewed this claim and its supporting evidence – the district court – found that Mr. Banks had established a meritorious Sixth Amendment claim. Certiorari is appropriate under these circumstances.

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[6] *Townsend v. Sain*, 372 U.S. 293 (1963); *Goodwin v. Johnson*, 132 F.3d 162, 183-84 (5th Cir. 1998).

[7] This ruling is inconsistent with this Court's construction of the exhaustion requirement. *See Vasquez v. Hillary*, 474 U.S. 254, at 257-58 (1986).

Claim #3
The Panel Plainly Erred By Holding That FRCP Rule 15(b)'s Application to Habeas Proceedings Is Not A Debatable Issue

In the district court below, Mr. Banks, with ample and repeated notice to the Director, demonstrated that the State's suppression of a lengthy pretrial statement involving its key guilt phase witness, Charles Cook, violated *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny. The district court did not adjudicate the claim, and did not grant a COA on this issue. 5R at 1209-17. The panel denied a COA as well, concluding that jurists of reason would not find debatable the question whether Fed. R. Civ. Pro. 15 (b)'s amendment-by- implied-consent rule applies to habeas proceedings. App. A at 2.

The panel's conclusion that Mr. Banks was not entitled to a COA concerning this issue is contrary to *Miller-el v. Cockrell*, No. 02-7662 (Feb. 25, 2003). This issue, at the very least, is one jurists of reason would find debatable. Moreover, the record plainly shows that all the parties were on notice that the suppression of exculpatory and impeachment material concerning key State witness Charles Cook would be heard at the evidentiary hearing held in the district court.

a. *Miller-El Warrants a Grant of Certiorari As Rule 15(b)'s Application to Habeas Corpus Proceedings is Debatable by Jurists of Reason*

The Court has just made clear that a habeas petitioner is entitled to be heard on the merits of his claim if he can demonstrate that the claim is one that is debatable among jurists of reason. *Miller-El*, *supra*; *Slack v. McDaniel*, 529 U.S. 473 (2000). In *Miller-El*, the Court announced the showing necessary in the following terms:

> A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot*, supra, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debated even though every jurist of reason might agree, after the COA had been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El, slip op. at 13.

There can be little doubt that Rule 15(b)'s application to habeas proceedings is an issue that is reasonably debatable. Indeed, this Court has assumed in prior cases that the rule applies. *Withrow v. Williams*, 507 U.S. 680 (1993). For the reasons set forth in the petition for writ of certiorari, it is clear that Mr. Banks was entitled to COA on this issue and the panel erred in denying COA.

b. *The Underlying Brady Issue was "Tried" by Implied Consent*

The Director's argument that Mr. Banks did not raise this issue until post-hearing briefs is completely controverted by the record.

First, Mr. Banks alleged in his petition that the prosecutors had withheld impeaching evidence on its two critical witness, Cook and Farr. Mr. Banks alleged, as one of several due process violations committed by trial prosecutors, that the prosecutors "knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*" concerning key State witnesses Charles Cook and Robert Farr. 1R at 46.

The Director plainly understood that Mr. Banks was asserting a claim that the State had withheld *Brady* material concerning both Cook and Farr. In its Answer, under the heading "The State did not suppress favorable, material evidence," the Director acknowledged that *Brady* imposed "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," [and that] "such favorable evidence includes impeachment evidence." 1R at 108-109. More specifically, the Director understood precisely that Mr. Banks was alleging that the State suppressed at trial material impeachment

evidence concerning Charles Cook. "Banks contends that the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.* at 207.

Thereafter, Mr. Banks conducted discovery and filed declarations from both Cook and Farr. Cook's declaration said, *inter alia*, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. Largely because of this proffered evidence, the Magistrate Judge granted Mr. Banks limited discovery and ordered the production of records in the possession of the State that concerned, *inter alia*, interview notes, and all other written documentation concerning Charles Cook. *See* 3R at 698. In compliance with this order, the District Attorney disclosed, for the first time, portions of his file. One lengthy document contained therein was the seventy-four page transcript of a pretrial interview between law enforcement officials and Charles Cook. This document, later marked and introduced at the evidentiary hearing as Petitioner's Exhibit B-04, became one important piece of *evidence* to establish his *claim* that trial prosecutors deprived Mr. Banks of due process of law by suppressing material impeachment evidence concerning the State's key trial witness.

After these disclosures, and well in advance of the scheduled evidentiary hearing, the Magistrate Judge issued an order establishing the issues on which she would allow the parties to submit evidence. Magistrate Judge Malone understood that Mr. Banks wanted to present evidence on three issues, the first one being " whether Petitioner's Fourteenth Amendment rights were violated by the State withholding critical exculpatory and impeaching evidence concerning at least two important witnesses–Charles Cook and Robert Farr." 2R at 630. The Order restated the Director's position on this issue that no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." *Id.* at 625. Importantly, the

Director made no objection of surprise–that Mr. Banks had expanded his due process claim–or that any portion of the claim was unexhausted. Thereafter, the Director provided notice that he would utilize this very exhibit to defend against the due process claim. *See* 3R at 689 ("to defend against the due process claim, the Director will submit as Petitioner's (sic) Exhibit 1, a copy of the entire investigative file of the Bowie County District Attorney's Office in the Banks case"), and indicated further that it would call Assistant DA Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." *Id.* The Cook statement was included in this file. Similarly, Banks made it very clear that he would use this same statement–Exhibit B-04–to establish his due process claim. 3R at 766.

At the evidentiary hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook and Farr took center stage. Counsel for Banks made an opening statement in which he confirmed that he would prove, *inter alia*, that the trial prosecutors had unconstitutionally withheld impeachment evidence with regard to both Charles Cook and Robert Farr. Tr. at 8. Moreover, counsel for Mr. Banks examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material, Tr. at 25-27, extensively examined Elliott about Cook's September statement, and had Elliott confirm that the document had *not* been disclosed at trial, Tr. at 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the exhibit that showed a staff prosecutor coaching Cook how to answer questions concerning his April statement that made no sense. Tr. 64-68. On further redirect, Elliott was asked still more questions about inconsistencies between Cook's trial testimony and statements in Ex. B-04. Tr. 72-74. During the hearing, this exhibit was moved into evidence with no objection from the Director. Tr. at 75.

Given all of these circumstances, the Director is plainly mistaken to assert that this claim was not asserted in the petition and Mr. Banks' failure to formally amend his petition left the claim out of the case. Even if this claim was not sufficiently pleaded in the petition, Rule 15(b) of the Federal Rules of Civil Procedure provides: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Moreover, "failure to so [actually] amend does not affect the result of the trial of these issues." Given the repeated attention to the issue of whether the State suppressed impeachment evidence concerning Charles Cook during the six-month period prior to the hearing, the Director had adequate and actual notice that the suppression of the September statement was within the gambit of "exculpatory materials" as the claim was articulated in the petition. Thus, the Director had actual notice that the issue was raised. *See Mongrue v. Monsanto Co.*, 2001 U.S. App. LEXIS 8485, 8 (5th Cir. 2001). Moreover, the failure of the Director to object to discussion of this issue at the hearing or object to introduction of Ex. B-4 on cross-examination of Mr. Elliott and Mr. Huff about the circumstances of the taking of the statement demonstrates the Director consented to litigating this claim. *See generally* Wright and Miller, 6A Fed. Prac. & Proc. Civ.2d 1493.

Certiorari is appropriate to review this important issue.

Claim #4
Jurists of Reason Could Easily Conclude that Mr. Banks' *Swain v. Alabama*[8] Claim Was Not Defaulted & Is Meritorious

The panel below denied Mr. Banks a COA, concluding that trial counsel's failure to timely object at trial defaulted the claim, and that while Mr. Banks had shown adequate cause to excuse the default, he failed to demonstrate prejudice. App. A at 74. It found that even though the state courts

[8]380 U.S. 202 (1965).

had found that Mr. Banks' showing of purposeful discrimination was sufficiently strong to satisfy the exceedingly demanding *Swain* standard, the fact that the State showed that no black was struck due to race foreclosed a finding of prejudice.

a. *Under Miller-El, Mr. Banks Has Made an Adequate Showing Of A Meritorious Claim and "Prejudice" to Show The Issue is Debatable Among Jurists of Reason*

We have previously set forth the *Miller-El* standard for showing an entitlement to a COA and to merits review. In *Miller-El*, the Court explained the type of showing that would establish that a Fourteenth Amendment peremptory strike claim was sufficiently debatable to warrant issuance of a COA. Mr. Banks' record evidence easily meets that standard.

At trial, the prosecution used four peremptory strikes to remove all four qualified African-American jurors. These strikes guaranteed the empaneling of an all-white jury in this mixed race case. Mr. Banks further showed that during the preceding five years, the District Attorney's office had struck over 90% of qualified black jurors while accepting more than 80% of the qualified whites in felony cases. Tr. Ex. A-01; Pet. RE Tab K; Tr. Ex. A-01, Table 2; Pet RE Tab L. Other evidence showed that the defense bar believed that Bowie County prosecutors would use their peremptory strikes to remove black jurors, and prosecutors often used race-coded jury sheets. SHTr at 58-61, 788. An expert statistician testified that there was no chance that this striking pattern occurred by chance. Tr. Ex. A-01 at 3.

While the state court erroneously refused to consider evidence from 1975 through 1978, it agreed that Mr. Banks' other evidence satisfied *Swain v. Alabama's* demanding prima facie case standard for purposeful discrimination. Pet. RE Tab D at 5. Nevertheless, because the prosecution

provided reasons for each strike at a hearing conducted thirteen years after the trial, he found that the strong prima facie case had been rebutted. *Id.*

The reasons provided by the prosecutors do not rebut this strong showing of systematic exclusion. For example, Calvin Woods, one of the four black jurors struck, was "pro-death penalty." He was struck allegedly because he answered "in a perfunctory way." SHTr. 3 at 931. However, despite claiming that he wanted to "begin a dialogue with" Calvin Woods, *id.* at 936, the prosecutor did not ask open-ended questions that would elicit narrative responses, but instead simply lectured Mr. Woods on the law. *See, e.g.*, 5SR at 1498-1500. The prosecutor's "perfunctory answers"explanation was pretextual. Joe Allen Burns, a white juror, gave similar one-word answers and was not struck. Moreover, Woods and Burns were questioned differently. For example, the first question to Burns revealed details about the violence of the murder and the fact that the victim was only sixteen, SHTr. 3 at 959, whereas Woods' first question, while similar in its general topic, *i.e.*, the crime, was worded in general, abstract language, about a human being intentionally killed during the commission of robbery. *Id.* at 934. *Miller-El* made clear that "[t]o the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry." *Miller-el v. Cockrell*, No. 01-7662 (Feb. 25, 2003).

The prosecutor later acknowledged that the historical disparity Mr. Banks established was not the result of race-neutral decision-making: "Yes, race does come in." SHTr. At 919. He also testified that this practice was so entrenched that "we took literally some razzing about placing Black jurors in criminal cases from the defense attorneys . . . [t]he first time [the District Attorney] put Blacks on a murder case, it shocked him." *Id.* at 906.

This showing, as *Miller-El* confirms, establishes that jurists of reason could find that Mr. Banks did suffer prejudice.

CONCLUSION

For the foregoing reasons, Mr. Banks respectfully prays that certiorari is granted.

DATED: February 27, 2003

Respectfully submitted,

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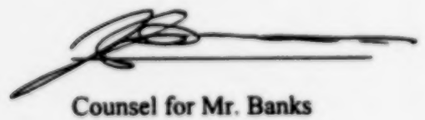

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Director's Opposition was furnished by overnight mail to the following attorneys on this 27th day of February, 2003:

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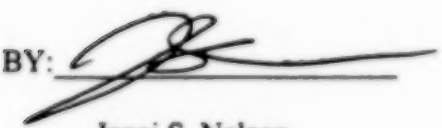
BY: 

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No. 02-8286

In the Supreme Court of the United States

DELMA BANKS, Jr.,

Petitioner,

v.

JANIE COCKRELL, Director.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE WILLIAM S. SESSIONS, AND THOMAS P. SULLIVAN, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE WILLIAM S. SESSIONS, AND THOMAS P. SULLIVAN, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William S. Sessions, and Thomas P. Sullivan, submit this *amicus curiae* brief in support of the petitioner, Delma Banks Jr.[1/]

1/ This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are former prosecutors, judges, and other public officials who maintain an active interest in the fair and effective functioning of the criminal justice system.[2/] *Amici* are committed to ensuring that the death penalty is fairly administered and is not procured through prosecutorial misconduct and violations of constitutional guarantees.

Although *amici* are concerned that all of the issues presented in the petition raise serious questions about the fairness of petitioner's trial, this brief focuses on petitioner's claims regarding prosecutorial suppression of evidence and ineffective assistance of counsel. These claims by their very nature raise issues that threaten the ability of the adversarial system to produce just results. The fairness of the capital sentencing process is dependent on the proper fulfillment of the roles of prosecutor and defense counsel. The prosecutorial duty to disclose material exculpatory evidence reflects the notion that prosecutors represent the public,

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2/ The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor's Commission on Capital Punishment.

which "wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When evidence is wrongfully suppressed, the prosecutor violates his duty to the public and also interferes with defense counsel's ability to serve as an effective advocate. Especially in a capital trial, such conduct diminishes the integrity of the prosecutorial function.

> Criminal trials may be a competitive process filled with sharp practices and gamesmanship. Whether such practices are consistent with justice in ordinary cases may be debated; certainly, however, such practices should cease when the imposition of a death sentence is at stake. Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

Mandatory Justice: Eighteen Reforms to the Death Penalty, at 48, http://www.constitutionproject.org/dpi/MandatoryJustice.pdf (2001) [hereinafter "*Mandatory Justice*"].

Similarly, the paramount importance of adequate defense counsel in capital cases cannot be overstated. When a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined. As this Court stated in *Strickland v. Washington*, 466 U.S. 668, 685 (1984):

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or

appointed, who plays the role necessary to ensure that the trial is fair.

The issues presented by this case are therefore of vital importance to lawyers fulfilling essential functions in the criminal justice system, such as judges, prosecutors, and defense counsel.

SUMMARY OF ARGUMENT

The questions presented in Mr. Banks's petition directly implicate the integrity of the administration of the death penalty in this country. The prosecutors in this case concealed important impeachment material from the defense. In addition, the district court found, and the court of appeals agreed, that Mr. Banks received ineffective assistance from his lawyer, at least at the penalty phase of his trial. The court of appeals' reasons for reversing the district court's grant of relief, and refusing to issue a certificate of appealability as to grounds rejected by the district court, are inconsistent with prior decisions of this Court.

Moreover, the court of appeals' treatment of these claims poses a significant threat to the fairness of future proceedings. By placing the burden on the petitioner to discover that the prosecution wrongfully withheld evidence, the court ensured that some of petitioner's claims would never be heard by a federal court, and provided an incentive to prosecutors to withhold evidence in the future. Similarly, by requiring petitioner to demonstrate that *each individual piece* of mitigation evidence that was not presented at trial as a result of his lawyer's substandard performance would have yielded a different result at the penalty phase, the court of appeals established an unreasonable standard by which to evaluate ineffective-assistance claims.

Because the constitutional issues raised in Mr. Banks's petition call into question the reliability of the guilty verdict and death sentence in his case, and because similar

flaws infect the reliability of death sentences around the country, thus substantially undermining public confidence in our capital punishment system, this Court should grant review.

REASONS FOR GRANTING THE PETITION

I. UNFAIRNESS AND INEQUALITY IN THE TRIAL OF CAPITAL CASES UNDERMINES PUBLIC CONFIDENCE IN THE CAPITAL PUNISHMENT SYSTEM

In recent years, mistakes and inequities in the capital punishment system have been the source of much analysis and discussion. A recent study of 4,578 capital cases found that serious errors are identified in nearly 70 percent of trials that lead to imposition of the death penalty.[3/] In addition, several studies have concluded that factors such as race, geography, and wealth play an unacceptable role in both the initial decision to seek the death penalty and its ultimate imposition.[4/] By some accounts, more than 100 death-row

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3/ James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii, http://justice.policy.net/jpreport (June 12, 2000) [hereinafter, "Liebman, *A Broken System*"].

4/ *See, e.g.*, Raymond Paternoster, *et al.*, *Final Report: An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (Jan. 7, 2003); United States Department of Justice, *The Federal Death Penalty, A Statistical Survey - 1988-2000*, http://www.usdoj.gov/dag/pubdoc.dpsurvey.html (Sept. 12, 2000); *see also Ring v. Arizona*, 122 S. Ct. 2428, 2447-48 (2002) (Breyer, J., concurring in judgment) (citing sources).

inmates have been exonerated since the death penalty was reinstated in 1976.[5/]

These and similar revelations have sparked a spirited public debate over whether the death penalty is fairly administered. In response, the governors and legislators of several states have called for a moratorium on executions until questions regarding the fairness of the capital sentencing process are answered.[6/] In addition, a number of public figures from a wide range of political backgrounds have openly voiced concerns that the death penalty may be unfairly administered and imposed against innocent defendants. For example, in a speech to women lawyers in Minnesota, Justice O'Connor stated,"[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." *See* Editorial, *Justice O'Connor on Executions*, N.Y. Times, July 5, 2001, at A16 (quoting

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5/ Press Release, *Curran Calls for Abolition of Death Penalty*, http://www.oag.state.md.us/Press/2003/013003.htm (Jan. 30, 2003); Press Release: *The 100th Wrongfully Convicted Inmate is Free After Ten Years*, http://constitutionproject.org/dpi/press_release_100th_exoneration.htm (Apr. 9, 2002).

6/ *See* Lori Montgomery, *Maryland Suspends the Death Penalty*, Washington Post, May 10, 2002, at A10; George H. Ryan, Governor of Illinois, Report of Governor's Commission on Capital Punishment at 1, http://www.idoc.state.il.us/ccp (Apr. 15, 2002); *Toward Greater Awareness: The American Bar Association Call for a Moratorium on Executions Gains Ground, A Summary of Moratorium Resolution Impacts from January 2000 through July 2001*, A.B.A. Sec. of Individual Rts. & Resps. 3, 5-6 (August 2001) [hereinafter "*ABA Study*"]; *see also* A.B.A., House of Delegates Resolution, http://www.abanet.org/irr/rec107.html (Feb. 3, 1997) (calling for a general moratorium on executions).

Justice O'Connor's speech to the Minnesota Women Lawyers Association, July 2, 2001). Similarly, on a recent trip to Cuba, former President Jimmy Carter referred to inequities in the administration of the death penalty in the United States as a human-rights concern, noting that "there is little doubt that the death penalty is imposed most harshly on those who are poor, black, or mentally ill." *Remarks by Jimmy Carter at the University of Havana, Cuba*, at www.cartercenter.org/news/pressreleases (May 14, 2002); *see also* Anthony Spangler, *Judge Expresses Concerns About Fairness of Death Penalty*, Ft. Worth Star-Telegram, July 24, 2001 (describing Texas state judge C. C. "Kit" Cooke's concerns regarding possible deficiencies in the death penalty system he helped to create as a legislator, including racial disparities and inadequate legal representation); James S. Liebman, *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1843-44 (2000) ("In April 2000 alone, George Will and Reverend Pat Robertson – both strong death penalty supporters – expressed doubts about the manner in which government officials carry out the [death] penalty in the United States, and Robertson subsequently advocated a moratorium on Meet the Press.").

In announcing Maryland's *de facto* death-penalty moratorium, Governor Glendening explained that "it is imperative that . . . our citizens[] have complete confidence that the legal process involved in capital cases is fair and impartial."[7/] Recent polls suggest, however, that the American public is equally divided over whether the death penalty is fairly administered.[8/] In addition, the vast majority

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7/ Bob Herbert, *Who Gets the Death Penalty?*, N.Y. Times, May 13, 2002, at A17.

8/ Jeffrey Jones, Gallup Poll In-Depth Analysis: The Death Penalty, at http://www.gallup.com/poll/analysis/ia020830viii.asp? (Aug. 2002).

of Americans – more than 80% according to one poll – believe that at least some innocent individuals are executed, and 91% of Americans said that they believe an innocent person has been sentenced to death in the last 20 years.[9/]

Two of the most predominant flaws in the current system are the persistent failure of prosecutors to disclose exculpatory evidence to the defendant – despite a clear constitutional command that they do so – and the often abysmal representation provided to capital defendants at trial. A study evaluating error rates in capital cases from 1973 to 1995 concluded:

> The most common errors – prompting a majority of reversals at the state post-conviction stage – are (1) egregiously incompetent defense lawyers who didn't even look for – *and demonstrably missed* – important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but suppressed it, again keeping it from the jury.[10/]

In May 2000, the Constitution Project established a committee to address "the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death." *Mandatory Justice* at ix.[11/] The committee's report identified as persistent

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9/ *Id.*; *see generally*, http://www.pollingreport.com.crime.htm (collecting polling data regarding public attitudes toward the death penalty).

10/ Liebman, *A Broken System*, at ii; *see id.* at 6.

11/ The Constitution Project, which is based at Georgetown University, "seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education." *Id.* at ix.

problems in the death penalty system as currently administered the "lack of adequate counsel to represent capital defendants" and the failure of prosecutors to provide the defense with exculpatory evidence. *Id.* at 1, 50.

Both of these flaws are implicated by this case. In his petition for a writ of certiorari, Delma Banks describes the unconstitutional conduct that occurred during his trial, including the apparently deliberate suppression of evidence by the prosecution, and the "dismal performance" of Mr. Banks's counsel. These claims go to the very heart of the effective functioning of the capital punishment system. Yet one of these claims has never been heard by any court. The others, although found to supply sufficient grounds for relief by the district court, were rejected – erroneously, it appears – by the court of appeals.

The courts are responsible to capital defendants and to the public to identify and correct constitutional errors in capital cases. As the Delaware Supreme Court recently observed, "[w]hile the adoption of the death penalty . . . is a legislative prerogative, the judiciary has a special obligation to ensure that the standards governing its application are applied fairly and dispassionately and, just as important, appear to be so." *Stevenson v. State*, 782 A.2d 249, 260 (Del. 2001). In this case, the court of appeals has allowed Mr. Banks's execution to go forward, despite uncured constitutional errors in the process through which he was convicted and sentenced. Because these uncorrected errors are typical of those that have undermined public confidence in the fairness of our capital punishment system, the significance of this case extends well beyond the interests of those who are personally involved in it. The Court should grant review to resolve unsettled questions regarding the federal courts' treatment of common defects in the capital sentencing process.

II. DISCLOSURE OF EXCULPATORY OR IMPEACHMENT EVIDENCE IS ESSENTIAL TO ENSURE FUNDAMENTAL FAIRNESS IN CAPITAL CASES

Under clearly established federal law, a state violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In addition, this Court has long recognized that "a prosecutor's knowing presentation of false testimony is 'inconsistent with the rudimentary demands of justice.'" *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of petition for writ of certiorari) (quoting *Mooney v. Holohan*, 294 U.S. 102, 112 (1935)). As a result, due process is violated when a prosecutor fails to correct testimony that he knows to be false, even when the falsehood goes only to the witness's credibility. *Alcorta v. Texas,* 355 U.S. 28, 31 (1957) (per curiam); *Napue v. Illinois,* 360 U.S. 264, 269 (1959). These principles illustrate "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In our system, the prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667, 675 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, the District Attorney's office assured Mr. Banks that there would be no need to litigate discovery disputes. In a letter to Mr. Banks's counsel, the prosecution wrote "we will, without necessity of motions, provide your office with all the discovery to which you are entitled." Pet. at 4. Despite this representation, the prosecution withheld evidence that would have allowed Mr. Banks to discredit two

of the State's most important trial witnesses. The court of appeals wrongly held that Mr. Banks failed to object at the appropriate time to the State's suppression of this evidence.

A. The Court of Appeals Improperly Relied on Fed. R. Civ. P. 15 to Prevent Adjudication of Meritorious *Brady* Claims.

It is undisputed that the State failed to produce in discovery a lengthy transcript of a pre-trial interview of Charles Cook by Bowie County law enforcement officers and prosecutors. The suppressed transcript substantially undermines the reliability of the State's principal guilt-phase witness.[12/] Mr. Banks presented a *Brady* claim in his federal habeas corpus petition, but obviously could not mention specifically the Cook transcript because the State had not yet disclosed its existence at the time the petition was filed. After the State finally produced the transcript – three years after Mr. Banks filed his habeas petition and nearly *nineteen* years after Mr. Banks's trial – the federal magistrate judge issued an order describing the issues that would be heard in the evidentiary hearing, including the State's "withholding exculpatory and impeachment evidence concerning at least two important witnesses – Charles Cook and Robert Farr." Pet. App. A at 50. The transcript was introduced at the evidentiary hearing, and Assistant District Attorney Elliot (who served as second chair for the prosecution at Mr. Banks's trial) confirmed that the District Attorney who

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12/ *See* Pet. at 20 n.10. As noted in the petition, Mr. Cook testified at trial that he had spoken to no one in preparation for his testimony. Pet. at 6, 19. The transcript demonstrates that this statement was false, and that Mr. Cook's trial testimony was extensively rehearsed. Nonetheless, the prosecutors – who were in possession of the transcript at trial – assured the jury that Mr. Cook testified truthfully. *Id.* at 6.

prosecuted the case had the transcript before the trial, but did not disclose it to Mr. Banks. Pet. App. A at 10.

The court of appeals rejected Mr. Banks's *Brady* claim regarding the Cook transcript on the ground that Mr. Banks did not mention the transcript in his federal petition, and did not move to amend his petition under Federal Rule of Civil Procedure 15 once the State disclosed the transcript in 1999. Rule 15(b) provides, however, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." As a result, and as the court of appeals recognized, "once issues are presented and argued without objection by opposing counsel, such issues are tried by implied consent of the parties and are treated as if they had been raised in the pleadings." Pet. App. A at 51 (quoting *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 389 (5th Cir. 1984)). Here, the magistrate judge informed the State in advance that impeachment evidence regarding Cook would be addressed at the evidentiary hearing, and Mr. Banks's claims regarding the Cook transcript were litigated without objection from the State at that hearing. Nevertheless, the court of appeals ruled that the lack of an amendment to the habeas petition precluded consideration of this aspect of the *Brady* claim. The court stated only that "Banks has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." Pet. App. A at 52.

As the petition demonstrates, this Court has suggested strongly that Rule 15(b) *does* apply to evidentiary hearings in habeas corpus cases. Pet. at 34-35. Indeed, the Fifth Circuit itself has operated under that assumption in several cases. *See, e.g., James v. Whitley*, 926 F.2d 1433, 1435 n.3 (5th Cir. 1991), *cert. denied sub nom. James v. Cain*, 516 U.S. 918 (1995); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 916 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

Moreover, the courts and commentators have observed that Rule 15(b) was designed "to avoid the tyranny of formalism," and "to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel." 6A Charles Alan Wright, *et al.*, Federal Practice & Procedure §1491 at 5, 6 (1990); *see Kirkland v. District of Columbia*, 70 F.3d 629, 634 (D.C. Cir. 1995). As a result, courts should and do interpret Rule 15(b) liberally. *See* Wright, *supra*, § 1491 at 6-9. If liberal application of Rule 15(b) is appropriate even in an ordinary civil case, the lack of a formal pleading amendment should not bar consideration of a valid constitutional claim in a capital case, particularly in the absence of any suggestion that the failure to amend affected in any way the State's presentation at the evidentiary hearing.

The court of appeals' rigid adherence to its cramped construction of Rule 15 not only precluded review of the State's withholding of material exculpatory evidence but also departed from the equitable principles that appropriately govern the exercise of the federal courts' habeas power. This Court has long recognized that the writ of habeas corpus should be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim."); *see also Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) (granting equitable tolling of applicable statutory limitations period in capital case "when the petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair"), *cert. denied*, 122 S. Ct. 323 (2001).

In this case, Mr. Banks's failure specifically to mention the prosecutors' suppression of the Cook transcript in his petition for habeas corpus is attributable solely to the State's concealment of the existence of the transcript. The State should not be permitted to rely on its own wrongful conduct to avoid adjudication of a clear constitutional violation that may have been responsible for the jury's guilty verdict.

B. The Defendant Should Not Bear the Burden of Discovering that *Brady* Evidence Has Been Wrongfully Withheld.

The prosecution also suppressed the fact that one of the State's key witnesses – Robert Farr – was a police informant paid for his role in the investigation of this case. At trial, Mr. Farr denied that he was a paid informant, and the State did not correct this erroneous testimony. Pet. App. A at 5, 23 (quoting Pet. App. B at 44). Instead, the State assured the jury that his testimony was truthful. The prosecutors told the jury that Mr. Farr "ha[d] been open and honest with you in every way," and that his testimony was of the "utmost significance." Pet. App. C at 44; Pet. at 7, 28-29. After his trial and after Mr. Banks's state habeas petitions had been denied, Mr. Banks located Mr. Farr – who had fled to California on the advice of his law-enforcement handlers – and learned that Mr. Farr was in fact a paid informant in connection with Mr. Banks's case, and that his trial testimony on key points was inaccurate. *See* Pet. at 8, 10, 27 n.12.

In his federal habeas petition, Mr. Banks raised a *Brady* claim based on the State's failure to disclose Mr. Farr's paid-informant status prior to trial, as well as its failure to correct Mr. Farr's false trial testimony that he was not an informant. At his federal evidentiary hearing, Mr. Banks presented testimony from Bowie County Deputy Sheriff Huff, the lead investigator in the case, and two affidavits from Mr. Farr himself, confirming that Mr. Farr

was paid to assist the police in obtaining evidence against Mr. Banks. Pet. App. A at 3, 9-10, 16. The district court adopted the magistrate's recommendation that relief be granted on this claim. Pet. App. B at 6. The court of appeals reversed, holding that Mr. Banks had not shown cause for his failure to develop the factual basis for this claim in state court and that Mr. Farr's and Deputy Huff's testimony was not "exhausted." *Id.* at 19-20, 22-23. The court concluded that, because Mr. Banks suspected that Mr. Farr was a paid informant prior to the conclusion of his state habeas proceedings, he should have made more of an effort to uncover evidence of that fact. Pet. App. A at 19, 21-22.

The court of appeals' decision inappropriately places on the defendant the burden of discovering that the State has wrongfully withheld evidence. Here, the responsibility for Banks's ignorance of Farr's paid-informant status rests solely with the State, which concealed it for years. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999) (facts that documents were suppressed and trial counsel relied on prosecution's open-file policy were "fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim"). This should be sufficient to establish the existence of cause for whatever procedural default may have occurred at the state level. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a showing that interference by public officials impeded counsel's efforts to comply with state procedural rule constitutes cause); *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").

Placing the burden on the defendant to discover that evidence has been illegally suppressed is particularly inappropriate in this case, because the prosecutors assured the jury that Mr. Farr testified truthfully, even though they knew he had not. Moreover, the suppressed evidence – *i.e.*, the fact that a State witness was a paid informant – was uniquely within the control of the State. *See Mandatory*

Justice at 50 ("While disclosure of all *Brady* information is important, a special responsibility exists where," as in this case, "the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony."). Mr. Banks already had questioned the only other person who was privy to the relationship – Mr. Farr – and the State assured the jury that his denials were true. By placing the burden on Mr. Banks to discover that this testimony was false, the court of appeals effectively rewarded the prosecutors' dishonest and illegal conduct by insulating the conviction from meaningful review precisely because of their misconduct.[13/] *Cf. Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) ("Since the prosecution has the

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13/ The court of appeals ultimately did address the merits of this *Brady* claim and held that the suppressed evidence was immaterial. *See* Pet. App. A at 32-33. Although the court acknowledged that Farr's testimony that Banks intended to commit armed robberies and, if necessary, kill the victims, "was crucial to the State's position on future dangerousness," it stated that the withheld evidence – *i.e.*, Farr's status as a paid informant – would not have contradicted that testimony directly, and that Farr's general credibility had been impeached in other ways. Pet. App. A at 32-33. This analysis ignores the independent significance that that the jury might attach to the witness's status as a paid informant in this case. Indeed, Farr's desire to conceal the fact that he was a paid informant was the likely reason that Farr testified (falsely) that it was Banks – not Farr – who needed a gun to commit armed robberies. The court of appeals' apparent supposition that all impeachment evidence is created equal is unfounded. The court similarly defied logic in suggesting that the jury would have regarded Banks's willingness to obtain a gun for Farr as equally probative on the question of future dangerousness as Banks's own alleged intent to commit armed robberies. *See* Pet. App. A at 32.

constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."). This ruling sets a dangerous precedent by providing the prosecution with an incentive to conceal *Brady* material for as long as possible.

III. THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS DEPENDS ON ADEQUATE REPRESENTATION AT EACH STAGE OF THE PROCEEDINGS

Adequate legal representation is essential to the effective functioning of the adversarial system. "The lack of adequate counsel to represent capital defendants" has been described as "likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Mandatory Justice* at 1. As Yale law professor Stephen Bright observed:

> Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1837 (1994).

Indeed, some commentators have concluded that the quality of counsel in capital cases is often outcome determinative. Citing Prof. Bright, the Constitution Project's

Mandatory Justice report concluded that "the quality of defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused." *Mandatory Justice* at 1. Similarly, Justice Ginsburg recently reflected: "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial. . . . People who are well represented at trial do not get the death penalty." *ABA Study* at 16 (quoting Justice Ginsburg's remarks on April 9, 2001).

Like many other capital defendants, Mr. Banks did not receive adequate representation in his capital murder trial. His lawyer presented no evidence at the guilt phase of the trial and failed to launch any substantial attack on the State's weak, circumstantial case. Significantly, Mr. Banks's trial counsel did not introduce any evidence to challenge the State's theory as to the time of death, which, as demonstrated in the federal hearing, was both questionable and important.[14/] *See* Pet. at 16-17. Regarding the penalty phase, the magistrate judge found "an almost complete lack of preparation," as counsel "waited until the jury rendered its guilty verdict before instructing Bank[s]'s mother to gather witnesses for the punishment phase, which began the following day." Pet. App. C at 22. Mrs. Banks passed out when she heard the jury read the guilty verdict, and she was taken to the hospital. After she was released, she called prospective witnesses until 3:00 a.m. the morning of the

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14/ The time of death was essential to the case because Mr. Banks reportedly arrived in Dallas (180 miles from the crime scene) less than five hours after the State alleged that the crime occurred. If, as the evidence presented in the federal evidentiary hearing suggests, the time of death was much later, Mr. Banks could not have been guilty. *See* Pet. at 15-17.

penalty phase. Pet. at 13-14. Mr. Banks's lawyer did not interview any of these witnesses before they testified, and did not conduct an investigation into the many mitigating factors and circumstances that would have shown that Mr. Banks did not present a danger to others in the future. Pet. at 11-12, 14; Pet. App. C at 22. Based on this "dismal performance," the district court ordered relief from the death sentence. Pet. App. B at 5, 6; Pet. App. C at 54.

The court of appeals' decision to reverse was not based on a determination that Mr. Banks received adequate representation. On the contrary, the court agreed that "Banks has demonstrated deficient-performance." Pet. App. A at 36; *see id.* at 39, 41. Nor did the court of appeals find that Mr. Banks's lawyers would not have discovered evidence of mitigating factors had an appropriate investigation been conducted. Rather the court separately considered each piece of omitted evidence that it believed was properly before it, and concluded that there was not a reasonable probability that any one piece of evidence – standing alone – would have altered the outcome of the proceeding.[15/] Pet. App. A at 39, 40, 41, 43-44.

In Williams v. Taylor, this Court held that the Virginia Supreme Court's determination that the petitioner was not prejudiced by his lawyer's inadequate performance was "unreasonable, insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." 529 U.S. 362, 397-98 (2000); *see also id.* at 397 (citing with approval the Virginia lower court's "assessment of the totality of the

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15/ The court held that some of the evidence should not have been considered in the federal habeas proceeding because it was "unexhausted." *See, e.g.*, Pet. App. A at 38, 42.

omitted evidence"). In this case, the court of appeals never weighed all of the mitigating evidence that would have been presented had Mr. Banks received adequate representation against the scant aggravating evidence produced by the State. It thus never properly answered the question whether Mr. Banks was prejudiced by his lawyer's errors, as required by *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In contrast, the magistrate judge and the district court – which did properly address the question – concluded that there was a reasonable probability that the jury would not have sentenced Mr. Banks to die if it had been made aware of the facts that would have been brought to its attention by effective counsel. Review should be granted to make clear that a deficient performance by counsel in a capital case cannot be overlooked on the basis of an item-by-item evidentiary review but must be evaluated instead through a fair comparison of what the jury actually heard with the totality of what it would have heard had counsel performed in a competent manner.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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IN THE

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DELMA BANKS, JR.,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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Order Denying Rehearing—09/23/02	450

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	State habeas proceedings-*Ex parte Banks*, Application No. 13568-03
01/13/92	Banks files third state habeas petition raising 17 grounds for relief
04/01/92	Banks files first supplement to writ adding 3 claims
04/02/92	Banks moves for discovery
09/30/92	Banks files second supplement to writ
10/01/92	Banks moves to compel discovery
10/01/92	Banks moves for investigative funds
02/22/93	State habeas court issues findings of fact and conclusions of law
02/25/93	Court of Criminal Appeals orders habeas court to conduct a hearing and to issue additional findings and conclusions
03/29 to 04/01/93	Evidentiary hearing conducted
07/22/93	State habeas court issues additional findings and conclusions
01/10/96	Court of Criminal Appeals denies habeas relief
	Federal habeas proceedings—*Banks v. Cockrell*, U.S.D.C. No. 5:96-CV-353
03/07/96	Banks files his original complaint/habeas petition (DE 1)
09/23/96	Director answers and moves for summary judgment (DE 13)

DATE	PROCEEDINGS
06/12/98	Banks moves for leave to conduct discovery (DE 55)
06/16/98	Banks moves for an evidentiary hearing (DE 56)
07/07/98	Director opposes Banks' requests for discovery and for hearing (DE 61)
10/28/98	Order—granting in part motion for discovery (DE 65)
01/21/99	Notice of evidentiary hearing set for 6/07 & 6/08 (DE 69)
01/21/99	Order—for parties to list issues for hearing (DE 70)
02/24/99	Director responds to order (DE 72)
02/26/99	Banks responds to order (DE 73)
03/04/99	Order—scheduling order (DE 74)
03/04/99	Order—no further discovery beyond that set in scheduling order (DE 75)
03/05/99	Order establishing issues for evidentiary hearing (DE 80)
05/11/99	Banks moves for admission of Robert Farr's declaration or for leave to depose Farr (DE 88)
05/12/99	Banks moves to compel discovery (DE 89)
05/19/99	Director responds to motion for admission of Farr declaration (DE 94)
05/21/99	Order—denying motion for admission and leave to depose but allowing Banks to present declaration at hearing, yet not ordering it will be admitted (DE 95)

DATE	PROCEEDINGS
05/21/99	Director files supplemental opposition to motion for admission (DE 97)
05/21/99	Director opposes motion to compel discovery (DE 98)
05/24/99	Affidavit from ADA James Elliott re: motion to compel (DE 100)
05/26/99	Order—denying motion to compel (DE 101)
06/07 - 06/08/99	Evidentiary hearing conducted
07/02/99	federal evidentiary hearing transcript filed (DE 116)
11/22/99	Banks files post hearing brief (DE 123)
11/29/99	Director files post hearing brief filed (DE 124)
02/11/00	Director's proposed findings and conclusions filed (DE 134)
03/07/00	Banks' proposed findings and conclusions filed (DE 139)
05/11/00	Magistrate—issues findings and conclusions, recommending relief (DE 141)
05/25/00	Director's objections filed (DE 143)
05/31/00	Banks' objections filed (DE 147)
08/18/00	Memorandum opinion and order—adopting R&R, except noted (DE 149)
08/18/00	Final Judgment (DE 150)
09/01/00	Banks moves to alter or amend judgment (DE 151)
10/05/00	Director responds to motion (DE 157)

DATE	PROCEEDINGS
11/16/00	Banks replies to the Director's response (DE 158)
12/20/00	Order—denying Banks' motion to alter or amend the judgment (DE 159)
02/01/01	Banks applies for a certificate of appealability ("COA") (DE 165)
02/20/01	Order-denying COA (DE 167)
	Appeal of federal habeas proceedings—*Banks v. Cockrell*, No. 01-40058 (5th Cir.)
08/20/02	Opinion reversing and rendering, and denying COA
09/23/02	Order denying rehearing

IN THE DISTRICT COURT
OF BOWIE COUNTY, TEXAS

No. ___

THE STATE OF TEXAS,

v.

DELMAR BANKS.

APPEARANCES:

Charles L. Attaway, Esq.
District Attorney's Office
505 West Fifth Street
Texarkana, Texas 75501

FOR THE STATE OF TEXAS

Lynn Cooksey, Esq.
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414 Texas Boulevard
Texarkana, Texas 75501

FOR THE DEFENDANT

STATEMENT OF FACTS

BE IT REMEMBERED THAT on the 21st day of May, 1980, the above styled and numbered cause came on for hearing on Examining Trial before the Honorable Ben Grigson, Judge of the Justice of the Peace Court of Bowie County, Texas, and the following proceedings were had.

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[3] THE COURT: Court will come to order and before we start this trial it is my duty to inform your client, Mr. Cooksey, will you have him stand up?

MR. COOKSEY: Stand up, please.

THE COURT: You have a right to testify in this case, but if you do testify anything you say can and will be used against you in the Court of law. Do you wish to testify?

MR. COOKSEY: Your Honor, we will waive our right to testify at this time.

THE COURT: Okay. This Court has been petitioned for an Examining Trial for Delmar Banks charged with capital murder, and it's the State of Texas v. Delmar Banks. What sayeth the State?

MR. ATTAWAY: The State's ready to proceed, Your Honor.

THE COURT: What sayeth the Defendant?

MR. COOKSEY: The Defendant is ready, Your Honor.

THE COURT: Okay, call your witnesses and let them be sworn in, please.

MR. ATTAWAY: Okay, we just have one witness, Willie Huff.

(The witness sworn by the Court)

THE COURT: Okay, you don't have but one witness so you won't need to invoke the rule.

[4] WILLIE HUFF, called as a witness on behalf of the State of Texas, having been first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. ATTAWAY:

Q. State your name for the record, please.

A. It's Willie Huff.

Q. And how are you employed?

A. Deputy Sheriff of Bowie County, Texas.

Q. And how long have you been so employed?

A. About eight years.

Q. What is your official job title at the Sheriff's Office?

A. Investigator.

Q. As part of your duties is it your responsibility with the Sheriff's Office to conduct the follow-up investigation on felony offenses that are committed within Bowie County and without the territorial limits of cities within Bowie County?

A. Right.

Q. I'll ask you whether or not part of your duties and as part of your job you had an occasion to become involved in the investigation of the murder of a person by [5] the name of Richard Whitehead?

A. Yes, sir, I did.

Q. If you would tell us please when you first became involved and how you became involved.

A. It was on the 14th of April, 1980, we received a call about—about 10:00 or 9:50, I believe, is when Cecil called our Sheriff's Office and said that there had been a body discovered in the Pocket Park out east of Nash, between Nash and Texarkana and Wake Village. I was dispatched to the scene.

Q. Okay, and what did you find upon arriving at the scene?

A. We found a body of a white male lying on the ground up by the pavillion in the park.

Q. And was that the body of a deceased human being?

A. Yes, sir.

Q. Did you find anything else other than a body?

A. We secured the scene; did a crime scene search; found two 25 caliber empty hulls; about seven Coors beer cans; and one missile, one projectile or one lead bullet that was already fired was matted in the blood clot right behind the victim's head on the ground.

Q. Okay. State what the appearance of the body of Richard Whitehead was when you first observed him as [6] you came on the scene.

A. Okay, the body was lying on its back; its arms kind of up behind him; he was dressed in blue jeans, blue cotton type track jacket. I forget what color shirt it was; a pair of track shoes; the shirt was somewhat pulled up over his stomach; the jacket was pulled off of one arm and was lying under the victim who was totally involved with rigormortis.

Q. Were there any scenes of trauma that had been inflicted upon the body, external trauma?

A. There were two noticeable wounds, one right behind the left ear in the bone right behind the left ear and one right between the eye.

Q. Okay.

A. And the nose, bridge of the nose.

Q. Alright. After you secured the scene and you conducted your crime scene search and investigation what did you do with the objects that you found?

A. I seized the objects and marked them as evidence. I have submitted the projectile, the two shell cases, to the lab, and I have the Coors beer cans locked up in my safe at the office.

Q. Okay. After you completed your investigation there at the scene, what did you have done with the body of Richard Whitehead?

[7] A. The body was picked up by Texarkana Funeral Home and was transported to Dallas to the forensic lab, Southwestern Institute of Forensic Science in Dallas at Parkland Hospital.

Q. Was that under the order or instruction of a magistrate here in Bowie County?

A. Yes, sir, I believe it was Judge Dunn's order.

Q. Okay. Now, have you received a final autopsy report back from them at this time or only a preliminary autopsy?

A. Just a preliminary at this time.

Q. Okay. What did the preliminary autopsy report reveal?

A. The preliminary autopsy report revealed that the victim had been shot three times; had been shot once in the right shoulder, once behind the left ear and once between the eyes. As far as any other reports or any other lab analysis or anything back as far as the authopsy I don't have any right now, but that's what their finding was, he was shot three times.

Q. Did they find that the cause of death was a gunshot wound to the head?

A. Yes, sir.

Q. Now, after you completed your on-the-scene investigation and had seen to the moving the body to the [8] forensic science lab, what if anything, did you do next in relation to this investigation?

A. We started back tracking the movements of the victim. I talked to Jerry Hamilton, the Chief. The boy was reported missing Saturday morning as a runaway or as a missing person. His mother had reported him to several police agencies here in town. We started checking back with her and talked to Jerry. Jerry Hamilton said that several people had seen him on Friday night. He had been out on a date Friday night. We, then, contacted the girl he was out on a date with and talked to her.

Q. Okay, what was her name as best you recall?

A. I've got it here if you'll just wait just a minute.

Q. Okay.

A. Patricia Hicks.

Q. Did Patricia Hicks relate anything to you in your investigation that led you to focus upon any particular person as a suspect in this murder case?

A. She related the incident or the order of what they did on Friday night, the last night that he was seen alive. Would you like for me to go into it in detail?

Q. Go ahead.

A. Okay, she, uh, this is from memory. She stated that Richard Wayne Whitehead had called her about [9] 5:30 on Friday, which, I believe, would have been the 12th, and wanted her to go with him riding around that night. So she said, "Okay." So Whitehead picked her up at about 8:30 at her residence and they went riding around to several places in Texarkana. One place was Texas High. One place was the skating rink. About 10:30 or a little after 10:00 they went to the College Bowl Bowling Alley. The vehicle they were in was a green 1969 Mustang with black vinyl top, a rust primer hood and a black fender. The Mustang was having problems with the alternator not charging or keeping the battery charged, and then when they would turn it off, they would have to get it jumped to start it, unless they had let it run with the lights off to charge it up. So they went to the College Bowl, went inside; talked to several people, came back out; tried to get the car started; the car wouldn't start. Mr. Whitehead went back in the College Bowl; borrowed a set of keys from one of his friends, came back out, and moved this other individual's car over there a started his. There was a black male standing at the foot of the stairs at the College Bowl at that time. The black male came over and talked to Richard about the car and they got it started and then Richard was walking back inside to take the keys back in. He came back out the black male talked to him again. Then Richard and the black male came to the vehicle, uh, Patricia Hicks advised that she [10] asked what was going on and Richard said, "We're going to take this boy home." And that he lives in Nash. So, uh, the black male got in the car in the back seat,

Patricia's the passenger, Richard was driving. They went to the Rawleigh Burger on Highway 82, cashed a $20.00 dollar bill into change. The black male gave Richard $3.00 to take him home. They pulled out and the black male asked them if they drank beer. Patricia's fourteen and Richard was sixteen. They said, "Yes, they drank beer occasionally." The black male said, "I'll go buy you some beer." They went to the Sportsworld on North Stateline, I believe, is the name of it. The car, when it would run for a while, the headlights would get dim and they would have to pull off, turn the light off and race the motor to get the battery charged back up. They bought, uh, two six-packs of Coors beer. The black male went out or went into Sportsworld and bought two six-packs of Coors beer, came back and got into the car; they drove down the Interstate back toward Nash. They had to pull off the Interstate, uh, the headlights were getting dim again. They pulled off the Interstate on to Summerhill Road at the Texaco Station and let the motor charge the battery up. The black male says, "We're going to get stopped. If I get caught with you with all this beer, I'm gonna go to jail. Let go out to Nash. I know a place where we can drink some beer and the police won't stop us, [11] or the cops won't mess with us." And so they took off to Nash from here. He lead them down to this park, it's an abandoned park in Nash. He had made a statement enroute that he had a stash out there if they ever needed any dope.

Q. Who made that statement?

A. The black boy did.

Q. Okay.

A. Okay. So they went to the park, uh, when they got to the park they backed up. The black male said, "You need to back down in here where Cecil can't spot us, if he comes in here." He didn't say police officer, he said, "Cecil" and that's the City Marshall of Nash. So they backed off down in there and they turned the car off. The little girl said she got worried because she didn't think the car was going to start, and told

Wayne that she didn't think the car would start and the black male said, "Well, don't worry if the car won't start, I just live right over here and I can go get my mother's car and bring it back and start it." They had their own jumper cables. So Patricia Hicks related to me that this black male and white male got out of the vehicle, walked around behind the car, and went off in the woods; stayed about three or four minutes and came back. And that Wayne told her that they couldn't find it. She just assumed they were talking about the stash. So they all sat on the hood of the can and they [12] chug-a-lugged two twelve ounce cans of beer, all of them did, of Coors Beer, and then the black male walked back out with the white male into the woods, came back and they drank some more beer. So, she got worried about what time it was and asked Wayne what time it was. He told her, I believe, it was ten after eleven or somewhere along in there. She had to be home at 11:00 she told him, and the black male said, "No, let's go back out there one more time and see if we can find the stash." And Wayne said, "No, I've got to get her home." The black male, the victim and Patricia Hicks got in the vehicle, started it up and carried her home. When she got out of the car at her house, Wayne told her they were going to get a flashlight and go back and see if they could find the stuff. That was the last time she saw him. Okay, you want me just to go on through the investigation or what?

Q. Right, yes.

A. Okay, 'cause we interviewed her again later. After that the movement was tracked to a girl's house named Patty Bungart. She stated that at about 11:30 or a quarter till twelve that Friday night that Wayne Whitehead and an unknown black male came to her residence and knocked on the door and wanted to use her restroom; that she knew him, uh, that she knew Wayne from, uh, well, she knew Wayne from working with him at Bonanza on State Line. So, she [13] let them in and they shot the bull a while and then they got ready to leave and this was about a quarter after 12:00. They went

back out to get in the car, the car wouldn't start so they had to use her car to start it. The black male was the one who put the jumper cables on it. Then she said they drove off and that was the last she had seen or heard of them after that. She said she didn't know the black male, but that his face was familiar. We reinterviewed Patricia Hicks. Patricia says that while they were enroute to the place in Nash that Wayne asked the black male, if he didn't know him. The black male says, "I don't think so." He said, "Well, didn't I work with you." Wayne asked the black male if he didn't work with him and the suspect asked him, "Where did you work last." Wayne said, "I worked at Bonanza, back in October," somewhere along in there. I'm not very sure about when it was. Then he says, "Oh, yes, you worked in the back." And Wayne was a bus boy, and then they remembered that they knew each other or that they were familiar with one another. They had only worked together maybe a week or two. So we contacted the manager at Bonanza. Patricia Hicks had given us a description about the black male having a tooth out in front of his mouth; being light skinned and not real thick hair and was wearing a blue set of coveralls. A new style coverall, this is not the kind that's got the hammer deal in the side, and a jacket. And that was the [14] description that Patricia gave us. We went to the manager of Bonanza, and asked him if he remembered the black male matching that description that worked there. He didn't right off the bat, so he started looking through his personnel records. We came up with the name of Delmar Banks. Delmar was described to me by the manager as having a tooth missing in front of his face, being a light skinned black male. We then located a Annual. This was a 1977 Annual for Texas High, located a picture of Delmar Banks on a page in the Annual, carried the annual to Patricia Hicks, had her look through six or seven pages of the Annual. She came to Delmar Banks' picture and identified him, positively, as the one that they picked up at the College Bowl. Carried the Annual to Patty Bungart. She went through the

same six or seven pages and identified Delmar Banks as the suspect or as the individual that came to her house at 11:30 or quarter to 12:00 the night that the boy come up missing. So that's how we established Delmar as a suspect.

Q. Thereafter, after that had occurred, did you have any contact with Delmar Banks?

A. No, sir. I just put him under surveillance to try to find his movements, to get some intelligence on his friends or just a basic background investigation on him.

[15] Q. Well, thereafter, after that time, he came to be arrested?

A. Yes, sir.

Q. Tell the Judge how that happened.

A. I believe, it was on a Wednesday on the 23rd of April, I received a telephone call from a confidential informant that stated that Delmar Banks was coming to Dallas to meet an individual and get a weapon. So we instituted a surveillance on him and saw him get into a vehicle, him and another black male, I believe, his name is Jefferson. They got in a white, '71 Ford or '72 or '73 model Ford. And they rode around town for a little while, then got on the Interstate heading west. I wasn't real sure they were going to Dallas or what they were doing until they got past Hooks or pretty near Hooks. I called for some assistance from Wake Village Units in an unmarked car to help us with surveillance. We followed them to Dallas, uh, around in Dallas. After a while we got some Dallas PD officers in unmarked units to help us with surveillance in Dallas. They went to a residence over in Oakcliff, pulled up to the house, the driver of the vehicle which was identified earlier, the people had had a flat, they got out and were changing the flat at the service station and we could see who the driver was. The driver was Delmar Banks. We kept the vehicle under surveillance until it went to a [16] residence over in Oakcliff, uh, the driver of the vehicle got out, went to the front door of the house, knocked on the door, another black male came to the door. They stood at the door and

talked a few minutes, the driver of the vehicle left stuffing something in his pants; climbed back in the car and left. They got lost several times leaving Dallas. Went through the medium, went backwards on the exit ramp and they were lost. We had Dallas PD stop the vehicle for traffic violations. There was a pistol, a 22 pistol found on the front seat of the vehicle next to the—in between the driver and the passenger and there was some narcotic paraphernalia found. The suspects were then taken to the Dallas Police Department and charged with—I'm not sure I don't have my file with me what they had them charged with.

Q. In any event when this weapon was found, did your investigation end there or what did you do next?

A. No, we located this weapon through contact with the lab and knew that the victim had been shot with a 25 caliber. The projectile had six linear grooves with a right hand twist. They advised that it would be not a common type of pistol like a Titan or a Browning or anything like that. We knew that the 22 wasn't the weapon.

Q. You knew it was not the weapon?

A. We knew it was not the weapon.

Q. What, if anything, did you do after that?

[17] A. We went back to this residence in Oakcliff; got the people up; talked to a black male there who's name was Charles Cook. He advised me Delmar Banks had just left his house that he had given him a 22 pistol. Well, he didn't say anything as to why or what. He also said that Delmar had left a 25 automatic with him approximately a week and a half to two weeks before then. I recovered the pistol from him, the 25 automatic, carried it to the lab in Dallas and it was positively matched with the bullets in the body, and the bullet that I located and the hulls at the scene. It had been the weapon that killed Wayne Whitehead.

Q. Were you advised by Mr. Cook or someone else there at Dallas, that Banks had been driving the Whitehead automobile that '67 Mustang you told us about?

A. Yes, Mr. Cook advised that he met Mr. Banks standing on the street corner about 9:00 o'clock or 8:00 o'clock on Saturday morning the 13th and that this black male in a fast green Mustang with the fenders messed up come up to the bus stop, stopped him and wanted to know where there was a motel to stay. That he didn't have much money and wanted to stay in a motel. And he befriended him and told him he would take him around and show him some places to stay, if Delmar would take his wife to work instead of making her ride the bus.

Q. Did the vehicle that he described to you, that [18] Banks' was driving at that time, match the description of the vehicle belonging to the Whitehead youth?

A. Yes, sir, it did.

Q. Okay. Has that vehicle ever been recovered?

A. No, sir. Not yet.

Q. Okay. You submitted the pistol to the lab in Dallas, I believe, you said?

A. Yes, sir.

Q. Okay. And they then told you that, the lab people did, that it was positively the weapon that had fire the bullet that had killed the Whitehead boy?

A. Yes, sir.

Q. After Banks was taken into custody in Dallas, was he then transported back to Bowie County?

A. Yes, sir. The Dallas PD took him into custody, I think about 4:00 or a little after 4:00. They were arraigned before a City Judge in Dallas and a little after 8:00 we, uh, brought him back to Texarkana the same day. I think, we got back here about 3:00 o'clock.

Q. Okay. After he was brought back here, was he arraigned before a magistrate in Bowie County?

A. Yes, sir, he was.

Q. And based upon that arraignment and the information presented to that magistrate, what charge was filed, if any, against him at that time?

[19] A. In Bowie County we filed, I filed. . .

Q. Here in Bowie County.

A. Capital Murder.

Q. Based upon the information furnished to the Judge or the Magistrate and the complaint, was bond denied on Delmar Banks for those charges?

A. Yes it was.

Q. Pass the Witness.

[20] CROSS EXAMINATION

BY MR. COOKSEY:

Q. That bond was denied, wasn't it, Deputy, without a hearing?

A. The bond was denied at the Miranda Warning Hearing.

Q. A Miranda Warning hearing?

A. The Magistrate's warning, statutory warning by the Judge.

Q. Well, the Judge denied that bond without hearing any evidence, didn't he?

A. Yes, sir.

Q. Now, you filed a capital murder charge?

A. I signed a complaint, yes, sir.

Q. Alright. Was the deceased robbed?

A. Yes, sir, of a vehicle and some money that's undetermined at this time.

Q. You don't know how much?

A. No, sir.

Q. Where is the 25 caliber pistol?

A. It's still in the lab in Dallas.

Q. I noticed that you have been refreshing your memory from some notes there. Could I see them, please?

A. I've got some things in here I haven't testified on.

[21] Q. That doesn't matter, you used it to refresh your memory.

BY MR. ATTAWAY:

Judge, unless he has a specific use for it, we're going to object to him just taking the notebook there. If he has a specific .. .

BY MR. COOKSEY:

The witness used that document to refresh his memory and I'm entitled to see it.

BY MR. ATTAWAY:

Judge, that's not true. Now only portions of it has he used. If he wants to draw his attention to that particular part of it, that's fine.

BY MR. COOKSEY:

I don't have photostatic recall, Judge. I can't recall everything he has said.

BY MR. ATTAWAY:

Well, Judge, we'll object to him getting those. Those are his investigative notes and he's used only parts.

BY THE COURT:

He's not got a right to look at all of them, but he can refresh his memory by re-reading it to Mr. Cooksey, whatever he asks him. But he might have different notes on the same page.

BY WITNESS:

[22] I really have different cases on different pages.

MR. COOKSEY:

Q. All I'm interested in is what you looked at when you were testifying.

A. Well, I testified to what I looked at.

Q. Well, show that to me.

A. Well, right here is Patricia Hicks' name.

Q. Alright. Her address is 701 Bluebird, Apartment 5, Wake Village?

A. I think that's Patty Bungart.

Q. Patty Bungart, what's her address?

A. 1715-112 New Boston Road. I believe that's it.

Q. What about the address of Charles Cook? Did you look in there and see about Charles Cook?

A. No, sir. Nobody asked me his address.

Q. Well, what is his address?

A. 1734 Marsailes.

Q. Is that Dallas, Texas?

A. Yes, sir.

Q. Is he known as 'Tu-Tu'?

A. Yes, sir.

Q. He's been to the joint twice?

A. I'm not sure about that. I couldn't testify [23] whether he had or not.

Q. Did you run this pistol on NCIC?

A. Yes, sir, we did.

Q. Well, what did you find out?

A. There was no record at that time.

Q. Have you found a record since then?

A. I hadn't run it again.

Q. Did you check any kind of registration on the pistol?

A. It's an old Galasie Italian, I believe it's an Italian model pistol. It was pitted and rusted.

Q. Did you check any kind of registration on the pistol?

A. No, sir, not yet.

Q. Are you still looking for the vehicle?

A. Yes, sir.

Q. What's Charles Cooks' wife's name?

A. I don't believe he's got a wife.

Q. I thought you said that he was taking his wife to work.

A. He's got, uh, they're not married.

Q. Well, his girl friend's name?

A. I believe it's Marie.

Q. What's her last name?

A. I'd have to look, and I just as soon not have [24] to show you my notebook.

Q. Well, look.

A. Marie Martin.

Q. Have you interviewed her?

A. Yes, sir.

Q. Did she ride to work with Delmar Banks?

A. Yes, sir.

Q. Where does she work?

A. Hyatt Regency.

Q. Did she confirm the Mustang story?

A. Yes, sir.

Q. Who is that Mustang registered to?

A. It's registered to, I believe, Mr. Whitehead, Larry Whitehead, the boy's daddy.

Q. Do you have the license number?

A. Yes, I've got it. I know, uh, the last numbers are 148, now, I don't remember. I can't find it, yeah, I got the tag number and the VIN number.

Q. Have you put both out on NCIC?

A. Yes, sir, I have.

Q. And you've not recovered the vehicle?

A. No, sir.

Q. Was your confidential informant that told you that Banks was going to Dallas a local person or one from Dallas? [25] A. Sir, I don't believe I'll answer that.

BY MR. ATTAWAY:

Judge, we'll object to that. Now, that's privileged under the law as to who our confidential informant is or any of the facts around it.

BY MR. COOKSEY:

I didn't ask him who it was.

BY MR. ATTAWAY:

Well, he's not entitled to know facts in which he can derive the name of the informant either, so, we'll object to any questioning concerning that confidential informant other than what he told him.

BY MR. COOKSEY:

Your Honor, I'm entitled to know how reliable his confidential informant is.

BY MR. ATTAWAY:

Judge, he's not entitled. We didn't get a warrant based upon his testimony.

BY MR. COOKSEY:

The reliability I can challenge, and if he's a guy in Dallas that's never dealt with him before I'm entitled to know that.

BY MR. ATTAWAY:

Judge, we didn't get a warrant based on the informant's testimony or his statement so he's not entitled [26] to know anything about him, other than what he said.

BY THE COURT:

Okay. The objection is overruled.

BY MR. COOKSEY:

Q. Was he local or in Dallas?
A. Sir, I'm sorry, I'm just not going to answer it.
Q. Well, the court has overruled the objection.
A. I'm sorry, I just can't.

Your Honor, would you instruct the witness to answer the question.

BY THE COURT:

Go ahead.

BY MR. ATTAWAY:

Do you agree that they're not entitled to have the information concerning our informant?

BY MR. COOKSEY:

I'm not asking who it is, Judge.

BY MR. ATTAWAY:

It's information from which he can derive the name of the informant.

BY MR. COOKSEY:

Surely, he's got more than one in Texarkana.

BY MR. ATTAWAY:

He may have a whole bunch of them, Judge, but [27] they're protected under the law. The disclosure of their names or information leading to their identity is privileged. He's not entitled to it and I object to it.

BY MR. COOKSEY:

I'm not asking that, Judge.

BY MR. ATTAWAY:

I object to any questioning about him except what he told him.

BY MR. COOKSEY:

I'm not asking who it is. I want to know if it is a man that is local, let's say Bowie County.

BY WITNESS:

I still can't answer it, Mr. Cooksey. I'm sorry.

BY MR. COOKSEY:

Your Honor, I'm entitled to know that.

BY MR. ATTAWAY:

He's not.

BY THE COURT:

Objection sustained.

BY WITNESS:

I'm sorry. I can't answer that.

BY MR. ATTAWAY:

You don't have to answer is what the Judge is telling you.

BY MR. COOKSEY:

[28] Q. How did you first make contact with Charles Cook?

A. We went back to his residence in Dallas.
Q. Well, what led you to it?
A. Following the suspect.
Q. Was he the one that went to the door?
A. The suspect?
Q. Yes.
A. Yes, sir.
Q. Was he the one driving the car?
A. Yes, sir.
Q. Was this decedent found within the territorial limits of any city in this county?
A. There's some-I don't know. Uh, he was found in Bowie County that's all I care about as far as where he was found. He was outside the Nash City Limits. Texarkana said he was outside their city limits and Wake Village said it was outside theirs. The park is property of the City of Texarkana.
Q. Alright. The reason I was asking, you got assistance from Wake Village Police.
A. Yes, sir.
Q. But it was outside their City Limits?
A. Right. The victim was from their city.

Q. Okay. Have you run any tests on the beer [29] cans?
A. It had rained and snowed. It snowed and rained and it was inclement weather the whole weekend. There was contacts made with the lab and they said it would be futile to send them in.
Q. So the answer to my question is no, you have not run any tests.
A. Right.
Q. Have you received a written ballistics results?
A. Yes, sir.
Q. Do you have that with you?
A. No, sir, I don't.

BY MR. ATTAWAY:

We will furnish that to Mr. Cooksey, Judge.

BY MR. COOKSEY:

Alright, sir.

Q. Have you received a written autopsy report?
A. No, sir. Just a preliminary cause of death report.

BY MR. ATTAWAY:

Likewise we'll furnish a copy of that to Mr. Cooksey and when the full autopsy report comes in, we'll furnish that, too.

BY MR. COOKSEY:

That's fine, Your Honor.

[30] Q. Was there anyone smoking marijuana on that night that Patricia Hicks told you about?
A. No, sir. Nobody ever smoked any.
Q. They were just looking for some?
A. Yes, sir.
Q. And they never did find it?
A. According to what she said, they didn't.
Q. What about Patty Bungart?
A. She never said anything either way.

Q. Who transported Mr. Banks back from Dallas?
A. I did.
Q. Was Wake Village still in assistance?
A. Well, they were there, they didn't—He was in my vehicle.
Q. Where did you file your complaint?
A. Here in Bowie County.
Q. Where?
A. Judge Dunn's office, I believe.
Q Okay. That's all I have, Your Honor.

BY MR. ATTAWAY:

That's all we have, Judge.

BY THE COURT:

I just want to ask one question. Because of what evidence that's been presented here is this case going to the Grand Jury tomorrow?

[31] BY MR. ATTAWAY:

It will be presented tomorrow, Judge, so I have been informed by Mr. Raffaelli.

BY THE COURT:

Because you haven't presented a lot of evidence here, but since it is—you informed me that it is going to the Grand Jury tomorrow . . .

BY MR. ATTAWAY:

That's correct.

BY THE COURT:

. . . I'm going to order that he be held to the Grand Jury without bond, because it's just one more day. That's on your testimony that it is going to the Grand Jury tomorrow.

BY MR. ATTAWAY:

I'll present an Order for you, Judge.

BY THE COURT:

Okay. Court's dismissed.

STATE OF ARKANSAS)
)
COUNTY OF MILLER)

I, Grace Baker, a Notary Public and Reporter in and for Miller County, Arkansas, certify that the above and foregoing thirty-one pages contain a full, true and correct transcript in question and answer form of all the evidence adduced upon the hearing of said Examining Trail of the above entitled and numbered cause.

WITNESS MY HAND this the 5th day of June, 1980.

_____

Notary Public in and for Miller County, Arkansas

WE AGREE THAT THE above and foregoing thirty-one pages contain a full, true and correct statement of all the evidence adduced upon the hearing of said Examing Trial of this cause, and we further agree that this record shall be filed as the Statement of Facts in this cause.

_____

District Attorney's Office
505 West Fifth Street
Texarkana, Texas 75501

FOR THE STATE

_____

Lynn Cooksey
Attorney at Law
414 Texas Boulevard
Texarkana, Texas 75501

FOR THE DEFENDANT

TRIAL TRANSCRIPT (Portions)

MR. RAFFAELLI: Ladies and gentlemen, my name is Louis Raffaelli. I previously introduced myself to you and I think we have met, but again I want to state my name to you. Seated at the counsel table here in the blue suit is James Elliott. He is an Assistant in the office, and it will be our privilege and duty to represent the State of Texas and the people of this county in this matter. We're going to prove to you beyond a reasonable doubt that Delma Banks killed Richard Wayne Whitehead during the course of robbing him of his automobile. That Richard Wayne Whitehead was shot three times: once in the back, once in the back of the head, and finally right between the eyes.

As His Honor has told you, capital murder is the killing of a human being during the course of robbing him, committed by the defendant. Now as I tell you, the State does not have an eye witness; however, when you look at all the evidence, and that is the evidence of the witnesses, pictures, the physical evidence, the scientific evidence, we will prove to you beyond a reasonable doubt that Delma Banks did kill Richard Wayne Whitehead during the early morning hours of April 12, 1980, and robbed him of his automobile.

In order to help you understand the evidence, I will go over the case with you and break it down into categories in order that you can see how the pieces fit together.

We will show you that Richard Wayne Whitehead was a young man who was killed on April 12, 1980, in Bowie County, Texas, and that at the time of his death, that his automobile was taken from him. That he was robbed.

First we will go back and we will track the last night or Richard Wayne Whitehead's life. In order to show you what happened that night, we will call three witnesses. We will call Patricia Hicks, Patty Bungardt, and Mike Fisher. Patricia Hicks, I believe, will show you that she had a date with Richard Wayne Whitehead that night. That she and Richard

Wayne went looking for his girl friend and her boy friend. They went to Texas High, they went riding around, they went by the College Bowl. Now when they were at the College Bowl. . .

* * * *

MR. RAFFAELLI: As I said, Patricia Hicks and Patty Bungardt will show you the last night of Richard Wayne Whitehead. Mike Fisher will show you that he heard several shots that early morning hours. The second phase of the case will be brought to you by the investigating officer, Willie Huff. Officer Huff would show you that he investigated the scene, and that he found some items there at the scene. That he continued his investigation. That because of his investigation, he had learned that Delma Banks was the last person known to be with Richard Wayne Whitehead. That he placed a surveilance upon Delma Banks. That due to this surveillance—this surveilance lasted for several days and due to this surveilance, they learned that Delma Banks was going to Dallas, Texas, with two other black men, and they followed them to Dallas, Texas.

I think the evidence will show you that at the time they were in Dallas, Texas, that they arrested Delma Banks, and that they continued their investigation and that they recovered a pistol, and that this pistol was forwarded to the laboratory.

Now the next category of people that we will have will be Charles Cook and his family, and they will show you that Delma Banks arrived in Dallas, Texas, during the early [1959] morning hours of April 12th, approximately 8:30. Mr. Cook and members of his family will explain to you in detail, and I'm not going to go into the detail, but they will explain to you what happened that Saturday, Sunday, and Monday that Delma Banks left Dallas.

The testimony of Charles Cook is an important witness. He will show you two things: first, that Delma Banks was

driving a green Mustang with distinct markings; and second, he will show you that the car belonged to Richard Wayne Whitehead. They became friends, they spent the next two days and nights together with members of his family. Now this man, Charles Cook, has a bad past. He has been to prison. He has two prior convictions. The proof will show you that even though they never knew each other, that he took Delma Banks in, that he tried to help him and they became friends. Charles Cook is a very important witness for two reasons. First, because Delma Banks admitted to Charles Cook that he killed Richard Wayne Whitehead and robbed him of his automobile. Second, because Delma Banks left the murder weapon and the stolen vehicle with Charles Cook.

I'm not going to go into detail now, as I said, but before they went to bed that night, Charles Cook and his wife spent the night in his home, with Delma Banks upstairs and before they went to bed that night, Charles Cook saw Delma Banks sitting on the bed, looking depressed. Charles Cook asked him what was wrong, and Delma Banks confided in him and told him that he had killed a boy in Texarkana and had robbed him of his automobile. When you see Charles Cook, I think you will see he is much older, or older, and more mature—a more mature man. Charles Cook told him he had been to prison and that Delma Banks could talk to him, could confide in him. Charles Cook will show you everything that occurred during those three days Delma Banks was in Dallas. The end result is that Delma Banks left the murder weapon and a car with Charles Cook. I think the evidence will show you that Charles Cook paid to put Delma Banks on the bus and send him back to Texarkana because he had promised to turn himself in. Charles Cook told you that he—will tell you that he took the automobile. . .

* * * *

MR. RAFFAELLI: I think the testimony of Charles Cook is critical, and I think that you will look at it and you will fully be able to see the complete picture of what occurred.

Now the next witness to come here and that you will hear from, I anticipate, will be Bennie Jones. Bennie Jones is a person who lives in Dallas, Texas, who purchased a .25 automatic, and that pistol was recovered from him. We will have additional witnesses of the Cook family that will corroberate the various details of Charles Cook's testimony.

You will hear from members of the Delma Banks family, and they will tell you that they went to Dallas, Texas, with Delma Banks to get his pistol which he had left with someone that they didn't know. You will hear experts in this case. You will hear an expert who performed the autopsy and he will tell you that Richard Wayne Whitehead was killed, was shot with a .25 caliber automatic pistol, and that he recovered two projectiles and he forwarded them to . . . .

MR. RAFFAELLI: Let me just state it to you as simply as I know how. First, is that Delma Banks killed Richard Whitehead on April 12, 1980, and robbed him of his automobile. We will prove those things beyond a reasonable doubt, I believe the evidence will show. Second, that he took the automobile to Dallas, Texas; that he met Charles Cook and admitted to him that he had killed the boy. Third, that he left the murder weapon and the Mustang with Charles Cook in Dallas, Texas. Fourth, that he returned to Dallas, Texas, a short time later in order to get the gun back. Fifth, that he was arrested; by retracing his steps in Dallas, Texas, the officers who arrested him recovered the murder weapon. I think you will see that this is a serious killing and that there was no need for Richard Wayne Whitehead to die. Delma Banks did kill Richard Wayne Whitehead, as he said, just for the hell of it. I think the evidence will . . .

* * * *

MR. RAFFAELLI: Thank you, Your Honor. Mr. Cooksey, ladies and gentlemen of the jury, as I was saying a minute ago, I think the evidence will prove beyond a reasonable doubt that Delma Banks did kill Richard Wayne Whitehead and robbed him of his automobile. At the conclusion of the evidence, the State will ask for a finding of guilty as to capital murder. Thank you.

THE COURT: Does the defense wish to make an opening statement at this time?

MR. COOKSEY: Your Honor, as per our rules of the court, I would request of the court that I be allowed to make an opening statement after the State has concluded its case.

THE COURT: You may do so then.

MR. COOKSEY: All right sir.

* * * *

ROBERT FARR

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q. State your name, please, sir.
A. Robert Farr.
Q. And, Mr. Farr, do you know Delma Banks?
A. I do.
Q. How long have you known him?
A. About two and a half or three years.
Q. Okay, and are you any kin to Mr. Banks?
A. Well, not really. No. He is—goes with my wife's sister.
Q. Okay. Could you—would you recognize Delma Banks if you saw him?
A. I would.

Q. Do you see him in this courtroom?
A. Yes, I do.
Q. Could you point him out to us, please, sir?
A. Right there (indicating).
Q. Okay, sir. I would have the record reflect that he has identified Delma Banks.

THE COURT: Is that the gentleman—well, how is he dressed?

A. He has a blue shirt on.

THE COURT: All right, the record may show that the witness identified the defendant.

Q. Mr. Farr, did you have an occasion to go to Dallas, Texas, with Marcus Jefferson and Delma Banks?
[2099] A. I did.
Q. Approximately when was that?
A. I don't recall, but it has been a few months ago.
Q. Okay. At the time you went, do you know where you went to in Dallas?
A. Yes, I do.
Q. Where was that, sir?
A. We went to a fellow by the name of Two-two's house.
Q. Did you know that fellow?
A. No.
Q. Have you ever seen him?
A. No.
Q. Okay, did you see him that day?
A. Well, I saw him but he was on the porch and it was dark. He came out, and that's all I saw.
Q. Did you talk to him?
A. No.
Q. Okay. Who, if anyone, talked to Two-two that day?
A. Delma talked to him.
Q. Of the three of you?
A. Delma.

Q. Okay, how long did he talk to him?
[2100] A. I would say between five and ten minutes.
Q. What did he do at the end of that conversation?
A. He came out to the car with us.
Q. Okay, where was that conversation at?
A. The conversation he had with Two-two?
Q. Yes, sir.
A. It was in the car. No, it was on the front porch of the house.
Q. Okay, sir, and at the time he left, did Delma Banks make any statement concerning his conversation with Two-two?
A. No, he didn't.
Q. Did he make any—do you know if he picked up any object while he was there?
A. Yes, I do.
Q. Okay, sir. Did he make a statement concerning that object?
A. Yes, he did.
Q. What was that statement, sir?
A. He said that his gun was in West Dallas, and Two-two gave him a .22.
Q. Okay, sir. Pass the witness.

[2101] CROSS EXAMINATION

BY MR. COOKSEY:

Q. Robert, you got a nickname?
A. No.
Q. You don't have?
A. No.
Q. You been to the joint?
A. No, I haven't.
Q. Never been to the joint?
A. No, I haven't.
Q Not even in California?
A. No.

Q. I noticed when you walked in, you've got track marks, haven't you?

A. Yes, I have.

Q. Show the jury your track marks?

A. Right here? Right there (indicating).

Q. What are you shooting, Robert?

A. I was shooting Dilaudid.

Q. Shooting Dilauded?

A. Yes, I was.

Q. Disolve it in water and shooting it?

A. Yes, sir.

Q. How long have you been strung out on Dilaudid?

[2102] A. Well, I got hurt in 1973, and the doctor strung me out and I started shooting it.

Q. What else do you shoot?

A. Well, at one time I was shooting Heroin.

Q. You got strung out on Smack, too, didn't you?

A. No, I did not.

Q. How long did you shoot Smack?

A. Maybe six months, because I had no reason to shoot Smack because the reason was that I had a supply of Dilaudid.

Q. You had a supply of Dilaudid?

A. Yes, I did.

Q. Robert, the truth of the matter is you know Two-two, don't you?

A. No, I do not know Two-two.

Q. His wife is from here, Robert.

A. I do not know Two-two or his wife. The first time I saw Two-two was when he came out on the front porch that night.

Q. Have you seen him since that date?

A. No, I have not.

Q. You just happen to remember his name?

A. That's all.

Q. Do you know why they call him Two-two?

[2103] A. No, I do not.

Q. Have you ever been busted for possession of drugs?

* * * *

Q. How long has it been since you shot up, Robert?

A. About three months.

Q. About three months?

A. Right.

Q. And have you ever taken any money from some police officers?

A. No.

Q. How long have you been fooling with drugs, illegal drugs?

A. How long?

Q. Yes, sir.

A. Are you talking about hard drugs?

Q. Yes, sir.

A. Ever since 1973.

Q. What other kind of drugs are you fooling with besides hard drugs?

A. Only Marijuana.

Q. Smoking a little bit?

A. Yes.

Q. Smoke some joints?

A. Yes.

Q. Are you holding now, Robert?

A. No.

Q. You're not holding where you live?

A. No.

[2104] Q. I see, and police officers promised you anything?

A. No, they have not.

Q. . . . to get you up here and say you don't know Two-two?

A. No, they have not, but your investigator tried to get me to commit perjury and I told him I would not do it.

Q. I figured you were going to say that, Robert. I figured you were.

A. Well, it's the truth.

Q. You know what, Robert? I want to ask you. You see, this jury is entitled to know, because you just sat here and you have admitted that you have been doing drugs, hard drugs, since '73, haven't you?

A. That's right, but it wasn't at my joint.

Q. Nothing has ever happened to you, has it, Robert?

A: No.

Q. That's all.

* * * *

RE-CROSS EXAMINATION

BY MR. COOKSEY:

Q. Well, Robert, did you ever give any police officers a statement?

A. In what way?

Q In anyway?

A. No.

Q. You never did?

A. No.

Q. Who did you talk to? What police officers [2108] did you talk to about this?

A. I have talked to no one about this, outside of when they called us down referring to the case.

Q. Who called you down?

A. When the District Attorney called us down to talk about the case.

Q. When was that?

A. That was about three or four days ago.

Q. Okay.

A. But there was no statement given. That's what it was, and I told him all I knew, and that's what it was.

Q. Well, Robert . . .

A. . . . and I told the truth.

Q. . . . I notice you're tracking on both arms.

A. No, that's not true.

Q. Look at your right arm.

A. (witness does.)

Q. Now look at your left arm.

A. (witness does.)

Q. You don't see tracks on both arms, Robert?

A. No, because for the simple reason is I can not shoot myself with my left arm because I'm right-handed and I've always shot with my right hand. I never shot [2109] in my right arm.

Q. But you have never been in trouble for all these drugs? Isn't that right?

A. No.

Q. All right.

* * * *

CHARLES COOK

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

* * * *

Q: Thank you, Your Honor. State, your name, please, sir.

[2112] A: Charles Edward Cook.

THE COURT: Can you hear all right back there? All right.

Q: Mr. Cook, where do you live?

A: 1735 South Marsailes.

Q: Okay, and are you employed, sir?

A: Yes, sir.

Q: By whom?

A: By the City of Dallas, Dallas Parks Department.

Q: Are you married?

A: Yes, sir.

Q: And do you have any children?

A: Yes, sir.

Q: How many?

A: One.

Q: How old is that child?
A: Child is three years old.
Q: Okay. Now, Mr. Cook, at that residence at Marsailes, do you have a `phone?
A: Yes, sir.
Q: What is that home phone?
A: 942-6232.
Q: 6232? Is that correct, sir?
A: Yes, sir.
[2113] Q: Now do you have a nickname?
A: Yes, sir.
Q: What is that nickname, please, sir?
A: Two-two.
Q: What does that mean?
A: My grandmother told me when I was a young kid, she used to tell me to count to ten and all I could say was, "One, two," so they just named me Two-two.
Q: Who put that name on you?
A: My great grandmother.
Q: Okay. Have you ever been convicted of a felony in this state or any other state?
A: Yes, sir. In this state.
Q: And when was that?
A: In 1972, I was convicted of assault.
Q: Okay, did you receive a punishment for that?
A: Yes, sir.
Q: What was that punishment?
A: Four year sentence in the Texas Department of Corrections.
Q: Okay, what was the other conviction?
A: Other conviction was theft over two hundred and under ten thousand, in Hurst, Texas.
Q: Were you punished for that, sir?
[2114] A: Yes, sir.
Q: And when was that?
A: In 1976, October 12th.

Q: Okay, what did you take at that time, on that theft?
A: I took six years.
Q: Okay, do you remember who you assaulted?
A: No, sir, I can't remember. That has been about eight or ten years ago.
Q: Do you remember what you stole at that theft?
A: Yes, sir.
Q: And what was that, sir?
A: I think it was some coats and a camera.
Q: Okay, did you plead guilty or were you found guilty by a jury?
A: Yes, sir, I pleaded guilty because I was guilty.
Q: A few months ago did you and your sister, Carol Cook, have a dispute?
A: Yes, sir.
Q: And were charges filed against you as a result of that dispute?
A: Yes, sir.
Q: What were those charges?
[2115] A: Arson.
Q: Are you now in jail on those charges?
A: Yes, sir.
Q: Whereabouts are you in jail?
A: Dallas County jail.
Q: Do you know an individual by the name of Delma Banks?
A: Yes, sir.
Q: Would you recognize him if you saw him?
A: Yes, sir.
Q: Do you see him in this courtroom?
A: Yes, sir.
Q: I ask you to point him out, please.
A: (Witness points.)
Q: Could you tell us what he's wearing, please?
A: Wearing a black shirt.
Q: Where is he seated?

A: White pants.

Q: Okay, ask the record to reflect that he has pointed out Delma Banks.

THE COURT: The record may so reflect.

Q: . . . as the defendant. How did—when did you first meet Delma Banks?

[2116] A: Met Delrna Banks on Saturday morning.

Q: Do you remember approximately when that was?

A: It was a week following Easter, around the 12th.

Q: How do you remember it was a week following Easter?

A: Well, because Easter was September 6th.

Q: How do you know that?

A: It was on a Sunday.

Q: Okay. Did anything unusual happen to any member of your family during that period of time?

A: Sir?

Q: Did anything unusual—did your sister or anything have anything unusual happen to them, or did you—did they do something at that time to make you remember that date?

A: No, sir.

Q: Okay, you say you first met him on April 12th, or thereabouts? Is that correct?

A: Yes, sir.

Q: On Saturday.

A: Yes, sir.

Q: Where did you first see him?

A: I saw him—me and my wife was standing [2117] on the bus stop, waiting for a bus for her to go to work.

Q: What is your wife's name?

A: Ida Marie Cook.

Q: Okay, and approximately what time of day was that, please, sir?

A: Around 8:15, 8:00 o'clock.

Q: Okay, and where was that bus stop located?

A: 1734 South Marsailes.

Q: How far is that from your house?

A: Well, it's right out-you just step out the front door.

Q: Okay, could you describe the circumstances of that meeting to us, please, sir?

A: We were standing there on the bus stop and this green and two-tone Mustang drove up, brown hood, black on one side, green on the other side, and back the side was green.

Q: Okay.

A: And this young man drove up in his car and asked me did I know where to find a cheap place to stay, and I told him that he might go right down here on Beckley and Overton Road, and he might find a place there to stay. He told me that he was from Texarkana, that he didn't know nobody in Dallas, and that he was looking for a place to stay [2118] and he was up here visiting, and maybe thinking about moving up here to Dallas, maybe bringing his wife and kid up there to Dallas, thinking about moving to Dallas. So I asked my wife did she know him, and she said no.

Q: Why did you ask your wife if she knew him?

A: Because my wife is from Texarkana.

Q: Okay, did she know him?

A: No, she said she didn't know him.

Q: Okay, what did y' all do then?

A: He asked me could I show him where this place was. I told him I was waiting for the bus to take my wife to work. He said, "Well," said, "I don't know nobody here." He said, "Could you come take me where the place is? I told him, I said, "I'm waiting to take her to work." And I said, "I tell you what, if you can take her to work for me," and he said yes, so I went in the house and changed clothes and went down to the Height Regency.

Q: Okay, you went to the Height Regency. Why did you go to the Height Regency?

A: That's where my wife works.

Q: Okay, and what did you do after that?

A: After we dropped her off, me and Delma came back to my house.

Q: Okay, let me ask you, do you know Delma [2119] by another name?

A: I gave him a name.

Q: What name is that?

A: Red.

Q: Is that a name you put on him?

A: Yes.

Q: When did you do that?

A: I did it sometime that day.

Q: Okay.

A: Instead of calling him . . .

Q: Why did you call him Red?

A: Well it's a good way for Blacks to communicate, same as if I was real dark in the face, you could call me Smoky. Just communication, I just called him Red because he is red.

Q: Okay. After you left the Height Regency, did you notice anything unusual about any of his clothes?

A: Yes, I noticed that he had some blood on his leg.

Q: Which leg?

A: Right leg.

Q: How much?

A: Oh, sprinkle of blood.

Q: Did you ask him about it?

A: Yes, sir.

[2120] Q: What was his reply?

A: He said that he got into it on the highway with a white boy.

Q: Did he go into detail?

A: He just said that—I asked him. He said he shot him.

Q: Okay, what did you do at that time or how did you feel?

A: Well, I didn't really believe him. I thought the young man was trying to impress me.

Q: You didn't believe him?

A: No, sir.

Q: What did you do next?

A: Well, went to my house and I put him in a pair of pants and a shirt and got him out of the clothes he had on, and I introduced him to my grandmother.

Q: What is her name?

A: Mrs. France Whiteurs.

Q: Okay. After you did that, what did you all do, if anything?

A: Took him over to a friend's house, and some friends house to visit my sister, that had a baby at Easter.

Q: You say your sister had a baby for Easter?

A: Yes, sir.

[2121] Q: Which sister is that?

A: Carol Nadine Cook.

Q: And did she have it a week before Easter, or when did she have that baby?

A: She had that baby on Easter.

Q: Okay. After you left—what time—do you remember approximately when you were at your sister's house?

A: Oh, around 11:00.

Q: You say it was around 11:00?

A: Around 11:00 or noon, 12:00.

Q: Where did you go next?

A: Next I went to—he wanted to take a bath and get some rest. I took him to a motel on Langston.

Q: Do you know the name of that motel?

A: No, I can't remember. You know, it was sitting on the left-hand side, right outside of Oak Cliff, past Ledbetter.

Q: Langston and Ledbetter?

A: It's on Langston, but it's sitting outside Oak Cliff out there, way out there on Langston, past Ledbetter.

Q: Okay, sir. What type of motel is that?

A: Oh, it's mainly for a motel just for six or five dollars for a couple of hours.

[2122] Q: Okay. In other words you don't have to spend the entire night there, or . . .

A: No, Sir.

Q: They'll rent you by the hour?

A: Yes, sir.

Q: Okay, approximately what time did you get there?

A: Got there around between 1:00 and 2:00 o'clock.

Q: Did you leave Delma Banks there at the motel?

A: Yes, sir.

Q: How long?

A: I left him there a couple of hours.

Q: Did you stay there during that period of time?

A: No, sir.

Q: Where did you go?

A: I went on down Langston and stopped on the corner of Langston and Keys at the feed house, and I bought my chickens something to eat and I took it home with me.

Q: How many chickens do you have?

A: At that time I had about thirty-four or thirty-five chickens.

[2123] Q: Okay, how did you get down there?

A: I went in the car that Delma was in.

Q: What time did you go back and get him?

A: I went back and got him—I went back and checked on him about forty or forty-five minutes, and the man said—I asked the man that cleans up the rooms how much time Delma had left because Delma was on the bed, asleep; and he said he didn't have long. He had about no longer than forty or forty-five minutes left. He didn't have too much longer left between then and the time the two hours was up.

Q: Okay, did you return and pick him up later?

A: Yes, sir.

Q: What did you do next?

A: Well, next we went and bought some chicken for my wife, and then went to pick my wife up.

Q: Is that approximately—what time of day does she get off?

A: She got off around 4:00 or 4:30.

Q: After you picked your wife up, where did y' all go?

A: Went back to my house and ate the chicken at my house.

Q: Tell us whether or not you asked your grandparents if Delma could spend the night with you?

[2124] A: Yes, sir, I got permission.

Q: Who did you have to ask?

A: I had to ask my grandmother first, and then I had to refer to my grandfather.

Q: Okay, did you invite him to spend the night with you?

A: Yes, sir, after I got permission.

Q: Did you all go out that night?

A: Yes, sir.

Q: Approximately what time did you get in?

A: Got in around 10:00.

Q: What did y' all do that night?

A: We rode around. I was showing him the city, and showing him different clubs and different parts of town. He said he wanted to come in and live; I was just, you know, mainly sightseeing.

Q: Approximately what time did you all go to bed?

A: We went to bed around 12:00-something.

Q: Okay, sir. Where did y' all sleep that night, you and Delma?

A: Well, my grandparents house, over there where me and my wife and my son live, it's a pretty big house and we stay upstairs, something like a little apartment, two bedrooms, bath, and me and my wife sleep in one room and my [2125] son sleeps in the other room in the corner of the top stairs.

Q: Now you said you and your wife sleep in one room and your son sleeps in one room. Is that correct?

A: Yes, sir, my son sleeps in the room to the right, on the corner.

Q: Okay. That night, where did Delma Banks sleep?

A: I let him spend the night in my son's room.

Q: Does your upstairs quarters, your little apartment in that house, does it have privacy? Does it have doors on all of the bedrooms?

A: No, it just have a door on the bath, and two bedrooms has no doors.

Q: What did you do, if anything, for privacy that night?

A: Well, to block him off from me and my wife, I put a pink spread over the door that Delma slept in, into that room.

Q: Did you notice anything unusual at that time?

A: Yes, sir, I noticed that Delma was sitting down on the bed with his head down.

Q: What did you do, if anything?

[2126] A: I asked him was anything wrong,

Q: What did he say?

A: He said, "Yeah, man," said, "I have lied to you."

Q: What did you say, if anything, when he told you that?

A: Well, when he told me that, I stepped, you know, up in the room where he was, because I was at the corner, getting ready to leave out the door, and he had a jacket over a dresser. And I said, "You lied to me about what." He said, "I have lied to you about that white boy, man." He say, "You people have really treated me nice; you really have been nice to me," and he said, "And I lied to you." I say, "What is it?" And then at this time I noticed that he had tears in his eyes, and I asked him, I said, "What's wrong, man? You can talk to me, tell me what's going on, because I've done been to prison twice, man, and I stay with my people and I can't afford no more trouble." He said, "Me and this white boy and his girl friend was riding around." He said, "This white boy took his girl friend home." He said, I—Delma said him and the white boy went in the woods together; they was drinking beer. He said the white boy went to the car to get another beer. Delma say this was when he decided to kill the white boy for the hell of it and take his car and come to Dallas. He said that he shot [2127] the white boy but he said he must have escaped him. He said the white boy turned around and

said, "Man, what's going on? What's happening? What did I do to you? What's going on?" Delma said he shot him again, and again. Delma said before he went to the car, sat down in the boy's car, he said he shot the boy again to make sure he was dead. He said then he got in his car and drove over his legs, and came to Dallas.

Q: When did he tell you that?

A: He told me that Saturday night.

Q: What were you feelings at that time?

A: Well, I was afraid and I told him the best thing that he could do was pray, because couldn't nobody help him now but God, that he was in big trouble, and I asked him what he was going to do and he said he didn't know. I said, "Well, you can't stay here now." He said to let him think about it, but I said, "You can't stay," and then that's when I noticed that Delma had a pistol.

Q: Okay, had you noticed that pistol before or is that the first time that you noticed it that night, that you were up in that room?

A: That's the first time that I noticed it.

Q: Now what did you do, if anything, at that time?

A: Well, I was afraid, and I left out of the [2128] room and told him to get him some rest, think about what he was going to do, you know. I went and laid down and watched over my family that night.

Q: Did you tell anyone about what you had just heard?

A: Well, I mentioned it to my wife.

Q: Okay. Mr. Cook, why did you not call the police or do something at that time?

A: Well, sir, I was afraid. I really didn't know what to do. I didn't know what to do.

Q: Now that was Saturday night? Is that not correct?

A: Yes, sir.

Q: Approximately what time did y' all get up Sunday?

A: Got up early Sunday morning, because it was sleeting rain and trying to find a place to stay, somewhere to go.

Q: What do you call early Sunday?

A: Around 8:00, 8:30.

Q: Okay, what did you-all do Sunday?

A: We rode around and we went to—I went to different apartments and homes of friends that I know, and I think we bought a six-pack of beer; just rode around, trying to find him a place to stay.

[2129] Q: Did you find him a place to stay?

A: No, sir.

Q: During that day do you know if Delma made any 'phone calls?

A: Yes, sir.

Q: Whereabouts was he when he made those 'phone calls?

A: He called Texarkana.

Q: Do you remember where he was when he called?

A: He called at my house.

Q: From your home?

A: Yes, sir.

Q: Do you know who he called?

A: I think he called his mother.

Q: Okay. After he got off the 'phone, did he say anything to you in regards to that telephone conversation?

A: Well, I couldn't hardly hear him talking but when he got off the 'phone, he had a little smile on his face and he said that his mother told him to come turn himself in. And I asked him was that what he was going to do, and he said yes, and he didn't have any money, so I was going to send him home.

Q: Okay, did you put him on the bus or did [2130] you send him home or get him to Texarkana that day?

A: No, sir.

Q: Why not?

A: Because I didn't have any money.

Q: Okay, and what day was that, now?

A: That was on Sunday, when I didn't have any money.

Q: What did you-all do Sunday night?

A: Sunday night we just stayed at home.

Q: Stayed there at your grandparents' house in your home?

A: Yes, sir.

Q: Okay, where did he spend the night Sunday night?

A: Sunday night he spent the night downstairs in the bedroom just before you come upstairs.

Q: Let me hand you what has been marked State's Exhibit Number Fourteen, and ask you if you can identify this, please, sir?

A: Yes, sir.

Q: When was the first time you saw that?

A: I saw this that Saturday night.

Q: Okay, whose gun is that?

A: That is Delma Banks' gun.

Q: Did you ever take that gun into your [2131] possession?

A: Yes, sir.

Q: When was that?

A: It was that Sunday night, when he was sleeping downstairs, in the downstairs bedroom.

Q: Okay, could you tell us about that?

A: Well, I told him that he could sleep downstairs because my wife was afraid, and I went downstairs and I got that pistol right there, and he wanted to know why I was taking that pistol and I told him, I said, "Man, you ought to be able to understand. I stay here with my people and I'm afraid and my wife is afraid." I said, "I'm going to take the pistol now," and I said, "You ought to be able to understand that." He said, "Yeah, man, I understand."

Q: Approximately what time did y'all go to bed Sunday night?

A: Well, it was around 9:00 o'clock. It wasn't too late Sunday night.

Q: What time did you get up the following morning?

A: I got up early the following morning, because I had to go to work.

Q: You had to work Monday?

A: Yes, sir.

Q: What time did you have to go to work?
[2132] A: I usually leave around 7:00, ten after 7:00, or 7:15, something.
Q: Did you see Delma Banks before you left that morning?
A: Before I left, yes, sir. He was there at the house.
Q: When was the next time that you saw him after you went to work?
A: When I came home from work that evening, around 4:30 or 5:00.
Q: Approximately what time?
A: Approximately 4:30 or 5:00 o'clock.
Q: What did y'all do, if anything, at that time?
A: Well, I didn't do nothing but wait on my wife to come home from work.
Q: What time does she get home?
A: She gets home around the same time I do, around fifteen until 5:00.
Q: Okay.
A: Whenever her bus arrives.
Q: Pardon me?
A: Whenever her bus arrives, around fifteen to 5:00, ten to 5:00.
Q: Does she take the bus home from downtown?
[2133] A: Yes, sir.
Q: After your wife arrived, what did y'all do, if anything?
A: After my wife arrived, went around to Hunt's Food Store and cashed her check.
Q: What did you do next?
A: And then went down to the Greyhound Bus Station.
Q: What for?
A: Because Delma's bus was leaving around fifteen to 6:00.
Q: You say his bus was leaving. Did he take the bus?
A: Yes, sir.
Q: Do you know where that bus—the destination of that bus?

A: At Texarkana.
Q: Did you see him get on that bus?
A: Yes, sir.
Q: How did he get to the bus station?
A: He went to the bus station in that Mustang.
Q: Well, what happened to the Mustang then?
A: What happened to it?
Q: Right.
[2134] A: That day?
Q: You had it at the bus station, did you not, Monday night?
A: Monday night I had it. I went home and it was parked there by my house, that Monday night.
Q: The Mustang was parked at your home Monday night?
A: Yes, sir.
Q: Did you take it home from the bus station?
A: Yes, sir.
Q: Okay. Where is the Mustang now?
A: I don't know.
Q: When was the last time you saw the Mustang?
A: Last time I saw it, it was early that Tuesday morning, when I took it and dumped it on Canada Drive.
Q: Dumped it where?
A: At the end of Canada Drive.
Q: Whereabouts is that?
A: That's in the West Dallas area, in Dallas.
Q: Is that a predominantly black area?
A: Basically, yes, sir.
Q: Okay. When did you take it there?
[2135] A: I took it there that Tuesday morning.
Q: Why did you do that?
A: Because I didn't want no part of it.
Q: You didn't what?
A: I didn't want any parts of it.
Q: Okay. After you dumped it over in West Dallas, what did you do?

A: I ran about three or four blocks and caught the crosstown, and I went to work.

Q: What is the crosstown?

A: It's a bus that go into different parts of Dallas, you know, go way out in the area. It's across town to travel, you know, from one place across town to another place, just one bus.

Q: Okay, in other words it's a bus that you caught over in West Dallas that took you back over to the Oak Cliff area? Is that correct?

A: Yes, sir.

Q: Did Delma take his pistol with him?

A: No, sir.

Q: Why not?

A: Because the pistol was still there at the house where I had hit it up under the white chest with no legs on it.

Q: You say where you hid it. When did you [2136] hide it?

A: That Sunday night, the night that I took it away from him.

Q: What did you do with the pistol?

A: I sold the pistol.

Q: Who did you sell the pistol to?

A: I sold it to a friend.

Q: Could you tell us that friend's name?

A: Name was Benny Lee Jones.

Q: How much did you get for it?

A: Ten dollars.

Q: Where did Benny Lee Jones live?

A: Across the street from me.

Q: Same block, just across the street?

A: Just right across the street.

Q: Did you sell him any other items?

A: Yes, sir.

Q: What were those items?

A: I sold him a green tool bos, and a set of battery cables.

Q: Okay, when did you sell him the pistol?

A: I sold him the pistol that Tuesday evening when I got home from work.

Q: Were you subsequently or later contacted by any law enforcement officers concerning that pistol?

[2137] A: Yes, sir.

Q: Approximately when was that?

A: About two weeks after that; two weeks or a week and a half after that.

Q: Okay, do you remember who was there?

A: No, I don't remember the name.

Q: How many?

A: Around seven or eight.

Q: Approximately what time of day was it?

A: It was early in the morning. It was around 3:30, between 3:30 and 4:00.

Q: Okay, did they request you to take to get that pistol?

A: Yes, sir.

Q: Did they ask you about a pistol?

A: Yes, sir.

Q: What did they ask you?

A: Well . . .

MR. COOKSEY: I'm going to object, Your Honor. That's hearsay.

THE COURT: Going to sustain the objection.

Q: Did you retrieve a pistol, or did you go get a pistol?

A: Yes, sir.

[2138] Q: What pistol did you get?

A: I went and got that pistol, there.

Q: Where did you get it?

A: Got it from Benny Lee Jones.

Q: Who was with you when you got it, if anyone?

A: The arresting officer.

Q: The arresting officer?

A: Yes, sir.

Q: Okay, is that the officers that came out to your house that morning?

A: Yes, sir.

Q: The pistol you got from Benny Lee Jones, is that the same pistol that you had previously sold to him?

A: Yes, sir.

Q: And that's that pistol there, State's Exhibit Fourteen, that you have identified as being the pistol that you took from Delma Banks? Is that correct?

A: Yes, sir.

Q: When was the next time that you saw or talked to Delma Banks after you placed him on the bus?

A: It was in that same week, I talked to him on the telephone, that I put him on the bus.

[2139] Q: Did you call him?

A: No, sir.

Q: Did he call you?

A: Yes, sir.

Q: Whereabouts?

A: He called me, but . . .

Q: Where were you when you got the 'phone call?

A: I was at home.

Q: What did he want?

A: He wanted to know had I got rid of the car and where was that pistol, and I told him that I got rid of it. He told me make sure that I had got rid of it because they was hot on him about that car, and make sure I got rid of that pistol. If I didn't, he wanted me to mail him that pistol.

Q: Okay, what did you tell him?

A: I asked him, "How do you mail a pistol? He said put it in a box with some cotton in it and mail it to me if you still got it. I told him okay.

Q: Did you mail him that pistol?

A: No, sir.

Q: When was the next time that you saw or talked to Delma Banks, if any?

A: I talked to him again around—it was early one morning, around 3:30 or something, before.

Q: Talked to him early one morning?

[2140] A: Yes, sir.

Q: Did you talk to him on the 'phone, or did you see him at that time?

A: Talked to him on the 'phone.

Q: What did he want then?

A: He said he needed to come and talk to me.

Q: What did you tell him?

A: I asked him for what, and he said, "Man, I need to talk to you," and I said where was he, and he said, "I ain't too far from your house." I said, "I thought you were going to turn yourself in." And he said, "Man, I can't do it. I need to talk to you."

Q: When was the next time you saw or talked to him?

A: I talked to him that Saturday morning when he came to my house, and I went down and got the door and he was standing outside the door. He said he needed a pistol and he asked me where was his pistol. I told him I had got rid of it. He said, "Well, man, I need my pistol because I got to go further." And I said, "Where are you going?" And he said, "I'll probably go to El Paso."

* * * *

Q: Is that the same morning that you saw him there at the—at your house that early morning hour, is that the same morning the police officers came and saw you?

A: Yes, sir.

Q: Okay. Mr. Cook, let me ask you to back-track just a hair. The Friday night before you met Delma Banks, where were you?

A: I was at home.

[2141] Q: Who were you at home with?

A: I was at home with my wife and my son and my grandmother and my grandfather.

Q: Did you work that day?

A: Yes, sir.
Q: Did your wife work that day?
A: Yes, sir.
Q: Did you work the next day?
A: No, sir.
Q: Did your wife work the next day?
A: Yes, sir.
Q: Did y' all go anywhere that night?
A: Yes, sir.
Q: Where did you—that Friday night, where did you go?
A: That Friday night we didn't go nowhere.
Q: Okay, you didn't go anywhere that Friday night?
A: No, sir.
Q: Okay. Have you ever been to Texarkana?
A: Yes, sir.
Q: When was that?
A: Last year.
Q: Approximately when?
A: Around the summertime.
Q: Why did you come to Texarkana?
A: Because my wife wanted me to come with her and visit her grandmother.
Q: Have you ever been to Texarkana any other time than that one time?
A: No, sir.
Q: Never have?
A: No, sir.
Q: Pass the witness.

* * * *

CROSS EXAMINATION

BY MR. COOKSEY:

Q Two-two, who all have you talked to about this?

* * * *

Q Are you known as Two-two?
A Well, my name is Charles Cook, but my friends call me Two-two.
Q You care if I call you Two-two?
A I appreciate it if you call me by my name.
Q What would you prefer that I call you?
A Charles.
Q You want me to call you Mr. Cook?
A That'll be fine.
Q Who all have you talked to about this, Mr. Cook?
A I haven't talked to anyone about it.
Q Haven't talked to anybody?
A No, sir.
Q Mr. Raffaelli just put you on the stand, not knowing what you were going to testify to. Is that what you're telling me?
A That's what I'm telling you.
Q Mr. Cook?
A Yes, sir.
Q Let's clear up a couple of things for this jury. All right?
A Yes, sir.
Q Number one, you fell in Dallas County in '72, didn't you?
A Yes, sir.
Q And it wasn't just for assault, was it, Mr. Cook?
A It was for assault.
Q It was for robbery by assault, wasn't it?
A Well, attempted robbery.

Q All right, sir, and then you fell in Ft. Worth, didn't you?
A In Hurst County; Hurst, Texas.
Q What?
A In Hurst. It happened in Hurst, Texas, sir.
Q Hurst?
A Yes, sir.
Q That's Tarrant County, isn't it?
A Yes, sir.
Q And you fell from Fort Worth, didn't you?
A That's correct.
Q That was for theft.
A That's correct.
Q I believe, Mr. Cook, that you failed to tell this jury about your drug habit. What kind of drugs do you shoot?
A I used to shoot drugs.
Q What kind of drugs do you shoot, Mr. Cook?
A I don't shoot any drugs now.
Q Why? Because you're in jail?
A No.
Q When did they put you in jail, Mr. Cook?
A I went to jail May 14th.
Q What?
A May 14th.
Q May 14th, and you forgot to tell this jury, Mr. Cook, about you being arrested and charged with obtaining a controlled substance by fraud, didn't you?

* * * *

RE-CROSS EXAMINATION

BY MR. COOKSEY:

Q Mr. Cook?
A Yes, sir.
Q You have testified in this court of law that you disposed of a murder weapon, didn't you, sir?

A Yes, sir.
Q And that you disposed of a hot automobile, didn't you, sir?
A Yes, sir.
Q Have you been charged as an accessory to a murder?
A No, sir.
Q You say that you had not been in Texarkana in a year. That's not true, is it, Mr. Cook?
A That is true.
Q Isn't it true, Mr. Cook, that you run narcotics down here to Robert Farr?
A No, sir.

* * * *

Q I guess you, like Robert Farr, you don't like my investigator, Dennis Waters, either, do you?
A I don't know Robert Farr.
Q How about Dennis Waters?
A I don't know him, either.
[2154] Q You know he was a narcotics agent for years.
A I don't know him.
Q What were you strung out on, Mr. Cook?
A I never been strung out on drugs.
Q What were you shooting?
A I was shooting Preludes.
Q How about Delaudin?
A No.
Q How about Smack?
A No.
Q Coke?
A No.
Q You did get arrested for obtaining illegal drugs, didn't you, Mr. Cook?
A I received a no-bill on that charge, sir.
Q That's what we're coming to. Have you been indicted for arson?
A Yes, sir.

Q Did they put the habitual criminal act on you?

A Yes, sir.

Q And they got you where you've got to testify, haven't they, Mr. Cook?

A No, sir.

Q You know, Mr. Cook, what does not make [2155] one ounce of sense to me is that you say, "Hey, man, I don't want to get in no trouble," and yet you dispose of a pistol, you drive a hot car around. That's not true, is it?

A That's true.

Q You're telling this jury that a man sits there and says, "I just murdered somebody," and you let him stay there in your house around your family and all of that for two or three more days?

A The man said he was going to turn himself in.

Q You didn't answer my question, Mr. Cook. You're going to let a man stay there around your family two or three days after he told you he murdered somebody?

A I was stuck with the man. The man didn't have nowhere else to go.

Q Mr. Cook, the truth of the matter is you are contacted quite often by the police, aren't you?

A No, sir.

Q How much of that time did you do on that robbery by assault? You did flat time, didn't you?

A I did two years and parole.

Q You did two years?

A Both times I paroled.

Q How much time did you do on that on your theft case?

[2156] A Two years.

* * * *

Q But you're telling this jury, Mr. Cook, that you were not in Texarkana on April 11th?

A No, sir.

Q That you were not with Robert Farr?

A I don't even know Robert Farr.

Q But at any rate I want to establish one point, Mr. Cook. You say that this man told you he killed somebody.

A Yes, sir.

Q And after that, you aid him, you assist a felon by disposing of the car and by disposing of the gun, didn't you?

A Yes, sir.

Q And you have not been charged with it, have you?

A No, sir.

Q That's all I have.

* * * *

Re-DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q Have you ever testified prior to coming to this courtroom, today?

A No, sir.

Q You have never been in a courtroom and been sworn in and testified as a witness?

A This is my first time ever been in the court.

Q At the early morning hours that the law enforcement officers came to your house back in April, do you remember what day that was?

A I don't remember the date.

Q Okay, sir, Did you give a statement to the law enforcement officers at that time?

A Yes, sir.

Q Did you write that statement out, or did they tape it, or how did that transpire, please, sir?

A Well, I told them about it and then they asked—they told me they would like for me to write it down on paper down at the city hall.

Q Did you do that, sir?

A Yes, sir.

Q Were you nervous?
A Yes, sir.
Q Approximately what time of the morning was that? Do you remember?
A It was early in the morning.
Q Pardon me?
A It was early in the morning.
Q Okay. Mr. Cook, are you telling the truth?
A Nothing but the truth.
Q Complete truth?
A Yes, sir.
Q Pass the witness.

MR. COOKSEY: I have no further questions.

* * * *

(At this time the jury left the courtroom. Counsel for the parties, the Judge, the defendant and the court reporter retired to the Judge's chambers where the following proceedings were had outside the presence of the jury as follows, to-wit:)

MR. COOKSEY: Now comes the defendant, Delma Banks, Jr., by and through his attorney of record and moves the court to instruct the jury to return a verdict of not guilty for the following grounds and reasons: One, that there is no evidence tending to show the guilt of this defendant and alternatively, that there is insufficient evidence in that the State has failed to meet its legal burden of beyond a reasonable doubt in proving this defendant guilty. For the further reason that the State has injected extraneous offenses purportedly committed by this defendant. Respectfully submitted.

THE COURT: All right, and your motion is overruled.

MR. COOKSEY: Your Honor, may [2241] the record reflect that this is in the Judge's chambers with only the court reporter, Your Honor, me, and Delma Banks present?

THE COURT: The record may so reflect, and that "me" is Mr. Lynn Cooksey, the defense attorney.

(NOTE: After the motion for instructed verdict set out on Page 2240, counsel for the State removed themselves from the Judge's chambers.)

MR. COOKSEY: And of course this is outside the jury's. . .

THE COURT: And outside the presence and hearing of the jury.

MR. COOKSEY: Delma, you understand that you have an absolute right to get on that witness stand?

(ANSWERS BY DELMA BANKS, JR.)

A Yes, sir.

MR. COOKSEY: You understand [2242] that you have an absolute right not to get on that witness stand?

A Yes, sir.

MR. COOKSEY: And that with the state of the case as it is, and you have heard all of the witnesses?

A Yes, sir.

MR. COOKSEY: And you have heard my cross examination.

A Yes, sir.

MR. COOKSEY: What do you desire as far as testifying or not testifying?

A Not testifying.

MR. COOKSEY: All right, you say that you do not want to testify?

A Yes, sir.

MR. COOKSEY: All right, you understand full well, Delma, that you have the right to testify?

A Yes, sir.

MR. COOKSEY: In the event you do not testify, His Honor, Judge Pesek, will instruct the jury that they may not consider that as any evidence of your guilt, the fact that you failed to testify. You understand that?

A Yes, sir.

MR. COOKSEY: And knowing all of that, you still want to make your own election that you do not testify?

A Yes, sir, I do.

MR. COOKSEY: Now, Your Honor, are you satisfied that he knows his rights in this connection and. . .

THE COURT: Let me ask this question of you, Delma. Do you have any question that you want to ask me, as Judge of this court, or ask your attorney concerning what he is talking about?

A No, Your Honor, I fully understand.

MR. COOKSEY: And you fully understand that if we don't take the stand, now, that we will not get to take the stand in this first phase of the trial? In other words what I'm say is if we—you make a decision that you don't want to testify, then the Judge will submit the charge to the jury; give the jury its instructions.

A Yes, sir.

Q And it's too late, then. You won't be allowed to come back and say, "Judge, I changed my mind. I want to testify." You understand that?

A Yes, sir.

MR. COOKSEY: Now if the jury [2244] finds you guilty, then just because you didn't testify in the first part doesn't mean that you can not testify in the second part. Okay?

A First and second?

MR. COOKSEY: Yes. You have been sitting here throughout this Voir Dire. You know that.

A This is the first part.

MR. COOKSEY: Yes, this is the first part.

A Oh.

MR COOKSEY: Whether you testify or not in the first part of the trial doesn't have anything to do with whether you testify or not in the second part.

A Okay. Yes, sir.

MR. COOKSEY: See, what I'm saying is the jury is going to go out the first time to either find you guilty or innocent. They vote guilty or not guilty.

A Yes, sir.

MR. COOKSEY: All right?

A Yes, sir.

MR. COOKSEY: If they find you guilty, then we go to the second part of the trial for the jury to assess a punishment of life or death. Okay? You [2245] understand that?

A Yes, sir.

MR. COOKSEY: So what I'm saying is—to you, so you will fully understand, the fact that you don't want to testify in this part doesn't mean you will not get to testify in the second part.

A Yes, sir, I understand that.

MR. COOKSEY: In other words you are going to get to make two decisions as to whether you testify or not if they find you guilty. You make that decision now, and you say you do not want to testify? Is that right?

A Yes, sir.

MR. COOKSEY: Then we'll have to come back in here if they find you guilty, and we'll go through this again because once again you can either testify or not testify in what we call the punishment phase of the trial. You understand that?

A Yes, sir.

THE COURT: Let me just say—I think he understands, but just so that I am absolutely sure that you understand, you have heard the State put on their side of the case. They have rested. They will not offer any more evidence. Okay?

A Yes, sir.

A Yes, sir.

[2246] THE COURT: Now it is your opportunity or your time to put on any evidence that you might want to put on, which would include your right to be sworn as a witness and to tell your side of the case. You understand that?

A Yes, sir.

THE COURT: You will not be given another opportunity to tell the jury your side of the case before they would vote, determine the verdict whether you are guilty or not guilty of capital murder. You understand that?

A Yes, sir.

THE COURT: And as your attorney further told you, that you do not have to testify and I am not by my statement to you telling you to testify, and I'm not telling you not to testify, because I will not do either one and I don't want you to infer by what I'm saying here that I think you ought to do this or not do that. Again, I want you to know all of your options, so that there is no question in your mind that you,

before making the decision to testify or not to testify, that you understand your options; because I am aware that most laymen, they may get a little bit confused as to what is really happening next in the trial, and I don't want you to feel nor does your attorney want you to feel that oh, I thought I didn't want to testify [2247] now but I thought I was going to get an opportunity to tell the jury such and such, my side of the case.

A Yes, sir.

THE COURT: This is that time. This is that time, to tell the jury if you want to, whatever you want to about the facts of this case, to put up your defense, or anything else you want to tell them. You understand that?

A Yes, sir.

THE COURT: Okay, and you understand that if you don't do it now, then I will in a written charge instruct them that they can not and are not to consider or hold the fact that you will not testify against you for any purpose whatsoever, but they will go to the juryroom with the evidence that they have right now. You understand that?

A Yes, sir.

THE COURT: Allright. Now understanding this, are you telling-well, I'm not going to ask anything else. That's not up to me, to ask that question.

MR. COOKSEY: All right. Now understanding full well your rights as to whether you testify or don't testify, and after the Court has explained that right to you, what is your decision, again?

A I don't want—refuse to testify.

MR. COOKSEY: That you refuse to [2248] testify? You want to remain silent?

A Yes. I do.

MR. COOKSEY: All right. Now I'm satisfied, Your Honor, that Delma Banks, Jr. understands full well his rights as far as testifying or not testifying, and it is my client's decision that he not take the stand, that he not testify, and that he remain silent. All right, sir?

THE COURT: All right.

MR. COOKSEY: All right. Now, Delma, you've got another right. You've got your mother and daddy up here, or anybody else up here, that I can require by law to get on that stand and testify. Do you understand that?

A Yes, sir.

MR. COOKSEY: Any of the people that the State called, I can make them come in here and testify. I can make your daddy get on the stand and testify. I can make your mother get on the stand and testify. In other words you've got a right not only for you to testify or not testify; you have got the right to call any of these people and make them testify. You understand that?

A Yes, sir.

MR. COOKSEY: Do you want me to put any of these people on the stand?

A Can I have a word with you?

[2249] MR. COOKSEY: Sure.

(At this time the Judge and the Court Reporter left the Judge's chambers, with Delma Banks, Jr. and his counsel remaining therein privately. After a short time, the Judge and Court Reporter returned to the Judge's Chambers where the following proceedings were had, to-wit:)

THE COURT: Let the record show that this hearing is held in Judge's chambers, outside of the presence and hearing of the jury panel, with the defendant defendant's counsel,

defendant's counsel's investigator, and the Judge and the Court Reporter present.

MR. COOKSEY: Your Honor, my client, Delma Banks, Jr., requested a moment ago that—or it has been some time ago, now, that he have a private conference with me outside the presence of the court, and of course the Court honored that. We appreciate that. We have had ample time, Your Honor, to confer.

THE COURT: All right.

MR. COOKSEY: And I have explained further to my client that not only does he have the right to testify or not to testify, but that he has the right to [2250] call witnesses or not to call witnesses. Now, Delma, you do understand that we can get a subpoena, which is a court order, from Judge Pesek that would make these people get on the stand and testify?

A Yes, sir, I do.

MR. COOKSEY: You understand that we can make anybody that you want to get on that stand and testify.

A Yes, sir.

MR. COOKSEY: Now would you tell the Judge, please, your decision as to whether to call somebody to testify or not to call somebody to testify?

A No, Your Honor, I don't want anyone to testify in my behalf.

MR. COOKSEY: All right, can you think of anyone that you would want to testify?

A No.

MR. COOKSEY: Now, Delma, going further, you do understand that on your first phase, if you do not call anybody to testify and if this jury finds you guilty, that that does not

keep you from calling people in the second phase where the jury will have to assess punishment?

A Yes, sir, I understand that.

MR. COOKSEY: So the fact that [2251] you don't call anybody in this first part of the trail certainly doesn't have any bearing on whether you want to call people or not in the second part, if there is a second part.

A Yes, sir.

MR. COOKSEY: All right. Your Honor, I am of the opinion that Delma is a bright young man. He certainly Delma, you don't have any history of any mental disorders, do you?

A No, sir, I don't.

MR. COOKSEY: Being treated for mental disorders, and you are stating to the Court that you are not mentally sick in any way?

A No, sir, I'm not.

MR. COOKSEY: You don't have a nerve problem of any kind or mental problem, do you?

A No.

MR. COOKSEY: And you have been able to understand all these things that have gone on the last two days, haven't you?

A Yes, sir, I have.

MR. COOKSEY: You have heard the testimony of the witnesses, and you have heard my cross examination of them, haven't you?

A Yes, sir.

MR. COOKSEY: And you have heard [2252] their answers to my cross examination, and you understand all that, don't you?

A Yes, sir.

MR. COOKSEY: Your Honor, it is my opinion that Delma Banks, Jr., fully understands his right: in connection with his testifying or his remaining silent, and also, Your Honor, his right to use judicial compulsions by way of a subpoena to require anybody that he wants to put on the stand to testify in his behalf, and Delma, do I understand that you do not desire to call any witnesses in your behalf?

A Yes, sir, that's correct.

THE COURT: I have only one thing. Is there any question concerning any of this or anything else that you would want to ask me at this time?

A None that I can think of, Your Honor.

THE COURT: Are you telling me that you understand everything that your attorney is saying to you?

A Yes, sir.

THE COURT: Okay. I am of the opinion that the defendant fully understands his rights, and if he does have any question whether he—and this question that I'm talking to you about is whether s material or not, if you will ask it, I will tell you whether it is or not [2253] or whether it pertains to it, so if you've got any question, if you ask me, I'll see that you get an answer. You understand?

A Yes, sir.

THE COURT: Okay. I am of the opinion that this defendant fully understands his rights and if he wishes to exercise his Constitutional right to remain silent, I think that he has a perfect right to do so, and he says that that is what he wants to do, and I think that that should be honored. And I think that he fully understands that he can call witnesses. If he has no witnesses to call or does not want to call any witnesses, that will be respected.

MR. COOKSEY: All right, sir, and I'm certainly of the opinion that he is intelligently and knowingly making these decisions.

THE COURT: All throughout this not only the last two days but last week in the selection and Voir Dire, in which we had other motions during and prior thereto, he participated in them; and I, too, am of the opinion that he is a bright young man, and able to understand the decision-making, and I think that counsel has more than adequately aprised him of his rights in the matter.

MR. COOKSEY: Delma, just one other thing. Can you think of anything else that you want me [2254] to do on your behalf before we submit this to the jury?

A No, sir.

MR COOKSEY: Are you satisfied with my representation of you to this point?

A Sure am.

MR. COOKSEY: Okay, and do you have any complaints to make to the Court at all at this time about my representation of you?

A Oh, no, sir. I don't.

THE COURT: Now, Delma, let me say this to you, and as I told you before, I want you to—I think it is very important that regardless of what may—the decision the jury may make in this case, that as far as the relationship that you have with your lawyer, that he has done what you wanted him to do, and that you are perfectly satisfied with his representation. Now if you are not satisfied with any part of his representation, I want you to make that known to me at this time. Are you fully satisfied with Mr. Cooksey's representation?

A Yes, sir, I am.

THE COURT: Has he conferred with you every time that you wanted him to confer with you—talk with you?

A Yes, sir.

THE COURT: Has he gone over the [2255] law with you?

A Yes, sir.

THE COURT: Has he gone over the facts of the case with you, as he sees them?

A Yes, sir.

THE COURT: Has he gone and told you what his opinion was concerning what people might testify or not testify to?

A Yes, sir, he has.

THE COURT: Is these anything that your lawyer has or you have asked your lawyer to do that he has not done, that he was capable of doing?

A No, sir, none I can thing of.

THE COURT: Have you talked with your parents, your mother and your daddy, about this case—and you have talked to them, I'm sure, have you not?

A Yes, sir.

THE COURT: Have you told your parents or explained to your parents that you are satisfied with Mr. Cooksey's representation of you?

A Yes, sir.

THE COURT: I can not talk to your parents, but I would ask you whether they have told you that they are or are not satisfied with Mr. Cooksey's representation of you?

[2256] A They are, sir.

THE COURT: They are satisfied? They told you that they were?

A Yes, sir.

THE COURT: And you told them that you were?

A Yes, sir.

THE COURT: You see, Delma, you may understand or may not understand why we are asking you these questions, and seems like we're going over and over the same old thing, but there is an important reason for it. Your lawyer is charged with the responsibility when he took this case to defend you to the best of his ability, number one. To defend you in the way that you wanted him to defend you. I, as Judge, as you know, I'm not taking any sides in this case. I'm not taking the side of the State and I'm not taking your side; but what I want to see and what I'm-working toward is to see that you get as fair a trial as the law could possibly give you. You are entitled to that, as a defendant in this state.

A Yes, sir.

THE COURT: Now a lot of these questions go to the question of getting a fair trial, and I want to be sure in my own satisfaction and also to your satisfaction that you have gotten a fair trial, and that's why we [2257] are asking these questions because if there is something there that I don't know about, I can't talk to you unless your lawyer is here, nor do I want to talk to you, because this is the way the system works. So while I have this opportunity to talk with you, if there is something out there that you feel that the Court should know, now is the time to tell me, and that's why we go back over these questions that I want you to know that you have the right to bring it up at this time or at the other times that we might have conversed, here. So again, I'll you and then I'm going to quit. Do you have any questions about anything?

DELMA BANKS: Not that I can think of.

THE COURT: Okay. All right.

MR. COOKSEY: I want to say this, Delma. I have tried lots of criminal cases, literally hundreds. I have never been treated more fair by any judge anywhere than I have in this trial, and I think the Judge has been very professional. I think that the Judge has assisted you, so that you do understand your rights, and I have just never been treated any more fair. Do you agree with that?

DELMA BANKS: Yes, sir.

MR. COOKSEY: And I sincerely appreciate it, Your Honor.

* * * *

[2264] The burden of proof is, as we told you in the beginning, upon the State. Our burden is to prove the guilt of the defendant beyond reasonable doubt. Not beyond all doubt, and not beyond a shadow of a doubt, but beyond reasonable doubt: beyond any doubt for which you might have a reason. You promised us that you would not hold us to a higher burden. Ladies and gentlemen, I believed you then and I believe you now.

The Court in its charge reiterates your oath about law and evidence and it says you will not consider or discuss anything not represented by evidence. Now perhaps you became confused someplace along the line, but let me reassure you that evidence was the answers and the testimony that came from that witness stand. It was not the question asked by the lawyer. No guesswork, no speculation. The exhibits and the testimony, that's the evidence.

You were also instructed with regard to circumstancial evidence and with regard to the law as it pertains to admissions against interest. Ladies and gentlemen, I want to come back to that with you; if you would, file that away and remember that we will touch upon this again. I would respectfully submit to you that based on the law in this

particular case, based on the evidence that you heard, you need go no further than that page right there (indicating). The one that says simply a person commits the offense of [2265] capital murder if the person intentionally and knowingly causes the death of an individual and the person intentionally commits the murder in the course of committing robbery; and a person acts intentionally or with intent with respect to the nature of his conduct or to the result of his conduct when it is the conscious objective or desire to engage in conduct or cause the result. That has a direct bearing about questions that you were asked on Voir Dire. We told you the State at no time placed upon us the burden to prove premeditation, and you didn't hear the word "premeditation" in that charge. We do not have to prove to you that this crime was planned a month, a week, or five minutes ahead of time. Only that when the crime was committed, it was intended to be done; that, and that alone, is our burden. Nor did you hear anything in the Court's charge about motive, and we told you that on Voir Dire. We don't have to prove motive because only the person who acts knows why. The evidence of the offense that you heard here would have revolted any thinking, feeling, human being with an ounce of sensitivity. To try to figure out why Richard Whitehead, a sixteen year old boy, wound up with three bullets in him, shot between the eyes, shot in the back, shot in the back of the head, is beyond this jury. It is beyond the ability of any good, decent human being. That's why you don't have to try to figure out a motive.

[2266] Ladies and gentlemen, to get to the crux of the issue, on your verdict form you need go no further than the first line on the back of the page, the one which says, "We, the jury, find the defendant, Delma Banks, guilty of capital murder." I would submit to you that based upon the evidence that you have seen produced here, that is the only just conclusion that you can reach.

With regard to the evidence produced here, let's review it simply, step by step. There was a time when I was so bewildered in the first day of this trial, felt like throwing up my hands, "Oh, Lord, my God, is there no help? Will we ever reach an end to this?" But let's stop and let's think about what we've got.

Patricia Hicks, the girl who was with Richard on his last day of his life, what does she tell us? That they picked up a black male that she identified as Delma Banks. There is no doubt. If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery. Every person that took that stand pointed at him. Maybe they didn't call him Delma Banks, maybe they called him Red, but they sure pointed to the defendant in this case. Let's think about what Patricia has to say. They are riding around, a sixteen year old boy, pick up Delma Banks. Whose idea is it [2267] to go buy beer? It's Delma Banks' idea. Who pays for the beer? Who purchases the beer? Delma Banks does. Whose idea is it to have a beer drinking contest? Why, it's Delma Banks' idea. What kind of contest? A chug-a-lug, where you try to drink beer real fast. And isn't it strange that Delma Banks, a grown man, always loses? Don't you get a feeling for something coming here? Don't you get a feeling that this young man is somehow being manipulated, that this sixteen year old boy wasn't quite prepared for what he met that night? Certainly wasn't prepared for his death. No man ever is. But to be slaughtered in that fashion, don't you get a little bit of a feeling about what's coming?

They take her home. She's not the only person that sees him that night. Patty Bungardt sees Delma Banks and Richard Whitehead; sees them late at night, around 11:00 or 11:30. That's crucial, ladies and gentlemen, because that places Delma Banks with the deceased in this particular case late at night in Nash, Texas, in that park out there where Delma led

them. Delma knew where the park was. He had a good idea: you pulled to the back of the park and you backed up so nobody could see you. He had been there.

Mike Fisher, early that morning, hears shots. I know he said he heard two shots; we have got three bullet holes. Ladies and gentlemen, a reasonable deduction that you may draw from that evidence is that the first shot was [2268] the one that woke him up, and the second two shots were the ones that he was aware of hearing. But a pistol, especially a .25 caliber automatic fired in the deep, dark woods, the report, the echo, the sound of that-easily muffled. Easily distorted. The important thing is that he heard shots.

Mr. Whitehead describes to us the car, the automobile, and I'll tell you what else he did for us, too. He did something that we absolutely had to do. We had to prove up the identity of that body. We had to prove that it was Richard Wayne Whitehead that was killed. Bear with me.

This is State's Exhibit Number One (indicating). We couldn't show it to you when Richard's father was testifying, but you know the picture he looked at to identify his son? That is it (indicating). That's the last way he'll remember his son. That massacred boy, that's a fine thing to have as the last lasting impression upon your mind. Didn't have to happen. Didn't have to be that way. Delma did it. Delma arranged that. Delma was responsible for Mr. Whitehead seeing this picture of his son.

Among other things Mr. Whitehead assures us that his son did not have to work. That his son was a hard-working boy, that he held down two jobs, that he was interested in bowling, that he came home fairly early. He was home by 10:30, seldom stayed out late. Now I admit we have Richard in a park, drinking beer. So what? We have a sixteen year [2269] old struggling with his adolescence. Just because a boy touches alcohol does not mean that he deserves to be

slaughtered. It doesn't mean that his life is worthless. You've got a prank or a stunt, and certainly nothing to justify murder.

The body is found and Willie Huff begins his investigation; and I want to tell you, folks, I'm proud of what Deputy Willie Huff found, and let's look at it. To begin with, he brings us the truth and like I said, this is a search for truth. This is what Deputy Huff found out there. This is what remains of Richard Wayne Whitehead after Delma Banks has had his way with him. This is it (indicating). This is what Willie Huff found out there in that park. This is what he told you about.

That was the scene that Deputy Huff recovered for us and preserved for us, so that we might know the true nature of what happened, but you know what he did? He went a step further and he solved for us one of the questions we have to answer, and that is was Richard Wayne Whitehead intentionally killed? You better believe he was, because you do not accidentally shoot someone between the eyes. You aim at them, folks. You execute them when you shoot them between the eyes.

Let's look at what else he found out there. He found shell casings fired from a .25 caliber automatic, and [2270] he found a spent projectile. Okay? He preserved those, but we didn't know the truth about those until later. We didn't know what these meant until we could get them to our experts and you know, our experts, by the way, are the ones that constitute the overwhelming advantage that the State has. Aren't we glad that we've got experts to help us find the truth about these matters? Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it? If that's an overwhelming against a poor citizen of Bowie County, the ladies and gentlemen, let me remind you that Richard Wayne Whitehead was a citizen of Bowie County. He was a citizen. He had rights. He had privileges.

Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth. Ladies and gentlemen, in order to bring you the total story, in order to bring you the whole truth, we call as our witness Marcus Jefferson. Now I'm going to be very honest. The people that we had on before you and the testimony that we produced was not that of a Baptist preacher and ten Deacons, but that's not because we wanted it that way. Delma Banks chose his friends. Delma Banks chose his in-laws. These are people of Delma's choosing, not us.

The people that you saw come before you today and the day before were thoroughly tested and I ask you to search [2271] your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengence or for advantage or to save their hides. I didn't see any.

What does Marcus Jefferson tell us? Basically the same thing that Robert Farr tells us; that they got in a car and that they went to Dallas, Texas, with Delma Banks. And, ladies and gentlemen, this is absolutely devastating when you think about the implications, and here is why. That's Delma's gun, folks. Now when Delma got in the car to go to Dallas, only Delma knew that was over there. Delma led the police to that residence and when Delma went up to Charles Cook's door and knocked in the night and then walked away, what did he tell you? He spoke to you through Robert Farr and Marcus Jefferson. You know what he said? He said, "They don't have my gun." This is my gun. This is Delma's. This is Delma's gun. Charles Cook didn't want any part of it. He said, "Man, I don't have your gun. I gave it away." Delma's gun. Delma knew it was there. You remember that when you try to piece this together, that when he went to Dallas, he went over there to get his gun: he went to get this, this filthy looking little piece of killing instrument belonged to him and nobody else, and all the soap and all the water in Bowie County can not

wash that fact out of this case. That is a reasonable deduction. Any [2272] other type of conclusion as to that weapon is unreasonable. If Delma didn't know that gun was over in Dallas, why did he drive over to get it? If Delma didn't think that that was his gun, then why when he came back to the car did he say, "They gave away my gun?"

Charles Cook told you who that gun belonged to. Charles Cook gave it to Benny Jones; and at the direction of the police officers, Benny gave it back to Charles and Charles gave it to the cops. That gun finally made its way back. It traveled, it killed, it went and hid in Dallas, Texas, it traveled, but it finally comes home because murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did.

I'll be very honest. I don't know if any testimony at all can be enjoyable in a proceeding like this, but I rather enjoyed Robert Farr's, because Robert was pounded on. You got tracks, don't you, Robert? You use drugs, don't you, Robert? And Robert came right back with the last thing in the world that the attorney asking him the questions expected, and that was the truth. He says, "Yeah, I use drugs." But you know what, folks? That doesn't have one single thing to do with the issue of who did that. That's a rabbit trail, and I'm not going to chase down rabbit trails, avoiding the ultimate issue of this case, [2273] and I'm not going to lead you down there, either. Regardless of what you hear, we're always going to come back to the truth and we're always going to put ourselves to resolving the ultimate issue in this case, and that is who killed Richard Wayne Whitehead? And having focused on Delma Banks, did Delma Banks kill Richard Wayne Whitehead? Did we prove it beyond a reasonable doubt? That's it; not drugs, not criminal record, not camouflage, smokescreen or wagon-loads of baloney meant to distract you but simple, straight-forward facts.

Now Charles Cook didn't hide anything from you, either. He came right up with it. Have you been convicted? Twice. Did you go on trial? No. I pled guilty. Why? Because I was guilty. He didn't hide a thing from you. Now if we had been picking witnesses for this case, we would have done a better job, but life is as we find it. We take our witnesses and we take the proof as it is given to us, as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you absolute truth. Now perhaps he doesn't remember every single detail. Perhaps he did not satisfy Mr. Cooksey, but don't you know that he is not a professional witness? Didn't he tell you that he had never testified before? He's only human. I challenge any one of you to try to sit down and reconstruct any weekend in your life and recall every single detail about it.

[2274] And then Charles Cook was jumped on. You mean a man confessed a murder to you and you didn't call the police? That's hard to understand for us, but we're not black folks living in South Dallas. Our lives are different. Why is not important. Charles Cook is not President of the Chamber of Commerce. Charles Cook is a man who has been hit with life; he has made mistakes. He came down here and told you about them, and here is an important thing, too. Charles Cook gave the murder weapon to the police, and Mr. Cooksey made a big to-do about that. Who did you get this from, Benny Jones. Charles Cook. Who did you give it back to? Charles Cook. You didn't get it from Delma, did you? No.

Stop and think about this, ladies and gentlemen. Charles Cook was the only one who knew where that pistol was and when the police came looking for it all he had to say was I don't know. If he wanted to dodge and duck and get out of something, if he had something to hide, he could have just said, "I don't know where the pistol is," and the investigation would have stopped right there, but Charles Cook didn't do that. Charles Cook was scared. Charles Cook didn't want any

more trouble. He has already had his share, so he led the police to the murder weapon.

Mr. Cook was asked why didn't he call the police after he had heard a murder confessed. Put yourself in that man's position. Put yourself in the position of anyone who [2275] abruptly receives a confession of murder. What do you do? Now s real nice to sit up here in this clean, antiseptic courtroom and wear coats and ties and figure out what should have been done and what would look nice. But if you're Charles Cook, in the upstairs of your grandparents' bedroom and you're fighting for your life, you're making two hundred dollars a week and you don't have a good past and you've got no hope for the future, then the answer is not so easy. Then you realize that not many people want to believe Charles Cook. Mr. Cooksey certainly didn't want to.

He dumped the Mustang. He sold the pistol. He tried to make a few bucks, and we don't deny that. We didn't hide it. We brought it out. That was not brought out on cross examination. You know what Charles Cook says? He says Delma was going to turn himself in after Delma called his mother.

Do you realize what the value of this telephone record is? Because the number on there, ladies and gentlemen, is Charles Cook's number, and there's a 'phone call made from Dallas, Texas, to the residence of Delma Banks here in Texarkana, just like Charles Cook said there was. This is consistent with what we know to be true, and Charles Cook told you that. He didn't hide and he didn't back up, and it got tough for him and he looked nervous and he bit his lips and he licked his lips. That's a pretty hot seat up here, [2276] folks. You sat there when you were being Voir Dired, and some of you found yourselves in a little bit of an uncomfortable position as you struggled to coming to the truth within yourselves. Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling

the truth. That doesn't lie. Mrs. Hamby doesn't have any reason to lie.

Ida Marie Cook. She got jumped on, too. You use drugs, you're strung out on drugs, you get drugs for your husband, don't you? Isn't it odd that when we talked about drugs and when we talked about criminal records, somehow we didn't want to talk about Richard Wayne Whitehead getting killed, did we? That wasn't a fit subject for conversation because that's too close to the truth. We didn't want to hear about that from Ida Marie Cook, did we? Cross examination never touched on it; left a lot of questions hanging up in the air. Bear in mind questions are not evidence. You may not consider them if you want to uphold your oath as a juror.

Bennie Lee Jones. He comes in and confirms exactly what Charles Cook said. Yeah, he sold me the gun. Yeah, I gave him the gun back. Yeah, that's the gun. Charles Cook didn't hide anything from you. We didn't hide anything with regard to any of these witnesses. We presented them to you [2277] as they were.

Mr. Whiteurs. If you doubt where Charles Cook spent the night the same night this young man had his life taken from him, look at Mr. Whiteurs. Is that a professional liar? Is that a professional witness? Is that a man scheming to save his own? That man can't come to you any other way. If we put him up here three hundred and sixty-five times a year, he would be the same because that's all he can be. He told you the truth. He put Charles in bed that night, 11:00 o'clock. He got him up that morning at 6:00. Is there any doubt where Charles Cook spent that night? None.

Do you remember Carol? Carol remembers that weekend. She remembers the week-end Red was up there, and she remembers it very well because both her and her sister had just given birth to children. That makes that week-end stand out. It doesn't just blend in.

We had our medical expert come up here and testify. Bear in mind what he said. Powder tatoo marks in the forehead. What did he tell us, that meant? That that muzzle was approximately a foot and a half to two feet away from that boy's face when it was fired. You can see the black marks in the picture, folks. You can see the powder tatoo in the boy's face. That is physical evidence that does not lie. That is physical evidence that will stand up under any [2278] scrutiny, under any cross examination. Doctor DiMaio told you what caused the death of Richard Wayne Whitehead. Gunshot wound. Doctor DiMaio also told you something else that sheds light on this case, and that is that he examined the hands. Do you remember when I asked him the question, did you examine the hands, did you examine the face? And he found a crusting abrasion on one of the fingers. That doesn't occur after death. There was not sign of a fight. There was no sign of a struggle. There was not one wound on the boy's face or hands.

I tell you, folks, it may sound rather strange to say that murder is a serious crime, but a lot of times we use words without thinking about their full impact. We gloss over them, we skim over them, but murder is serious, but we never quite stop and wonder in depth about why. It's such a taboo, you know, we don't do it. We know we hold murder to be the most serious crime, but let's stop and think about why, and that is because murder takes away the most precious thing on earth, and that is a life. It is absolutely irreplaceable once it is gone. You can't put it back. You can't undo the harm and the grief that is left behind.

Richard Wayne Whitehead: sixteen year old boy. He'll never see the trees, the spring. He'll never see our rain. He won't feel the warm sunshine on his cheeks. He'll never walk into that house again and say, "Hi, Mom, I'm home." [2279] That's why it's serious. When you saw Mr. Whitehead up here look at the picture of that son, that's why it's serious. We

don't have to tolerate this in our society. We need not put up with murder. We do not have to do this, ladies and gentlemen. You have been given the evidence that will allow you to return a verdict of guilty, and let's talk about the particular type of evidence that we've got.

It is circumstancial evidence, but like we told you in the beginning, it does not raise our overall burden of proof one little inch. It doesn't require us to take down every absolute possibility under the sun, in infinity, that is absolutely imaginable. All that we are required to do is prove our case beyond a reasonable doubt. To a reasonable and moral certainty. I submit to you that all that means is that you are to be as sure about this part of the case as you are any other. That's all that means. It doesn't set up an impossible standard, and it says that must exclude to a moral certainty every other reasonable hypothesis and I would suggest to you that the operative word is "reasonable." What is reasonable, not what might have happened. Not that the Martians came down and did this, but what is reasonable? What is consistent with the facts? What is consistent with the evidence that you heard?

I think this next paragraph is a little bit illustrative of that. It says that you are not to rely on an [2280] admission against interest standing alone for a conviction. An admission against interest is referring to when Delma Banks told Charles Cook, "I thought about killing the kid for the hell of it." That's what Richard Wayne Whitehead's life was reduced to in that moment. For the hell of it. And when is the next time to see Delma Banks? He's sitting in Dallas, Texas, in that car. In Richard's car.

Now let me tell you what circumstantial evidence is not. Let's say you got a car and you send your spouse to the grocery store for some groceries, and she goes to the grocery store and she gets groceries and she comes back and she cooks and y'all eat and go to bed, and you get up the next

morning and there's a dent in your car, and you come back inside and you say, "Why didn't you tell me you wrecked the car?" That is not what we're talking about here. Any intelligent, decent citizen of this county knows that that will not hold water in a court of law one split second, and that's not what we're talking about.

Let's look at some of the facts and circumstances in this particular case.

THE COURT: You have four minutes.

MR. ELLIOTT: Thank you, Your Honor. The gun. The gun that belonged to Delma. The gun that Delma went to get. The gun that only Delma knew was there. The gun that he didn't get at Charles Cook's, but [2281] when he came back out and sat down in the car, "They don't have my gun. " That admission to Charles Cook, "Yeah, I shot the white kid for the hell of it, shot him three times," you don't say things like that if you don't mean them, folks. That's why they are admissible into evidence as prove against one accused of crime, because reasonable people do not go around admitting to murder unless they did it.

The grandfather. Did Mr. Whiteurs—you know, he kind of helps us fill up this little gap of circumstancial evidence, here. You know, he told the truth. He identified Red-Delma. You ask what a reasonable person does in those circumstances. You look at reasonable from the point of Charles Cook, and it differs a little bit from what you and I imagine to be reasonable. These are not simply facts that point a suspicious finger. These are not simply empty, mindless allegations. Perhaps in figuring out any other reasonable hypothesis, we could come to one other conclusion about how this might have happened, and the only other reasonable conclusion is this, that everybody that you have seen in this courtroom has conspired and banded together to frame Delma Banks. Marcus Jefferson wants to frame Delma, Robert Farr wants to

frame Delma, Charles Cook wants to frame Delma, the police want to frame Delma, the balistics experts want to frame Delma, the medical examiner wants to frame Delma, our lady from the telephone company wants to frame Delma. [2282] It does not make sense, ladies and gentlemen. All in God's world we are asking you to do is come to a reasonable conclusion based on the evidence, and there is but one reasonable conclusion and that is that Delma Banks, as he sits right there, is guilty beyond reasonable doubt of committing capital murder. We told you that was what we were driving at in the beginning, and that's where we are now and the evidence, ladies and gentlemen, is irrefutable. We piled it up a block at a time, a stone at a time, and it turns into not just a reasonable pile of evidence that sort of points to Delma. It is a mountain that shouts his guilt. I will have the privilege of addressing you again. Right now, thank you for your attention.

THE COURT: Mr. Cooksey?

MR. COOKSEY: May it please the Court.

THE COURT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: How much time did you allocate us?

THE COURT: Forty-five.

MR. COOKSEY: All right, sir, I'll give some back. Ladies and gentlemen, thank you very, very much. You have been very attentive. You have listened [2283] to the evidence. Some of you have been actually conscripted now for ten days. That's a tremendous sacrifice on the part of our citizens of this county, performing the jury service as you have performed. Number two: my heart goes out to Mr. and Mrs. Whitehead. I, too, have lost a child. There is nothing more painful, nothing more hurting that can happen to a person.

Ladies and gentlemen of this jury, I think probably from my individual Voir Dire that as the Judge has read you the charge, that is the law the Judge has now submitted to you and in just a short while will give to you to take to the jury room. The Judge has defined the law and the evidence and told you how to apply the evidence to this case. I want to go over some of the Court's charge with you very briefly. I know that you good folks are tired, I'm tired, we have been at this a long time, but I want to go over some things with you and see if we can touch some points that I feel are important. Number one, as I told you when I was selecting you on Voir Dire, you are the sole judges of the credibility of the witnesses. You are to—why did they testify this way, did they tell the truth, are they trustworthy people, would they honor an oath if they were given one?

The Court has said that as soon as you retire to the juryroom, you will select one of your members as Foreman. That Foreman is to preside in an orderly fashion, just as [2284] the Court says, for you to deliberate and talk about what you have seen and what you have heard. If you desire to communicate with the Court, there is a buzzer up there that the bailiff will show you, and Mr. or Mrs. Foreman, the communication must be in writing to the Court and you hand it to the bailiff. The bailiff will respond to the buzzer and bring the note to the Court.

Judge Pesek has told you this case depends upon circumstantial evidence. The Judge says that in order to warrant a conviction, each fact necessary to the conclusion sought to be established must be proved by competant evidence beyond a reasonable doubt. It must be consistent with each other, these facts, and they must be of a conclusive nature. On the whole, they have to produce a reasonable and moral certainty that the accused and no one else committed this offense. The Judge says, ladies and gentlemen of the jury, it is not sufficient that the circumstances coincide with,

account for, and render probable that Delma Banks did what he is accused of doing. The Judge says the State's burden is to exclude to a moral certainty every other reasonable hypothesis.

Ladies and gentlemen, whoever the Foreman is, I want you to read what Judge Pesek has told you the State's burden is in this case. It's going to be up to you then to determine whether the State has met that burden or whether [2285] they have not. Now the judge says on an admission against interest, the Judge qualifies that. He says with an alleged admission, and then the Judge says, "if any." If any. All right? You look at the judge's charge. The Judge says an alleged admission, if any. Then the Judge by law, as I explained to you, most of you, on the Voir Dire, submits to your capital murder, murder, aggravated assault. That's what these pleadings have raised. You can go through that and there is nothing uncommonly difficult about it. It is very basic and very simple, as to what the Court has told you that it is.

Let me talk to you a little bit about capital murder and murder and aggravated assault. Judge Pesek tells you that a person commits the offense of capital murder if that person intentionally causes the death of an individual and the person intentionally commits that murder in the course of committing a robbery. You have to come up with evidence beyond a reasonable doubt that Delma Banks, while he is committing a robbery, killed somebody. Think real hard and see where that evidence is. There is none. There is no proof that Delma Banks was in the course of commiting a robbery and killed someone. Not one scintilla. Not one ounce of proof is there for this, ladies and gentlemen. Not one. All we have heard and all the State says, he shot this man and stole his car. That's not what the Judge tells you capital murder is. He says to you, ladies and gentlemen of this jury, the State has got to prove to you that Delma Banks, Jr., is in the course of committing a robbery and then he takes a life. The Judge says

if that is not there, then you folks consider murder. Murder is the intentional taking of another person's life.

Now what evidence has the State brought to you on that? The only evidence that they have brought to you is that Delma was at the bowling alley and he goes with the decedent; they are together, and they drink a little beer. He loses him for over four hours. Mike Fisher says he didn't hear that gun report until 4:00 o'clock in the morning. Did they show by the autopsy report that the decedent had a higher level of alcohol? It certainly wasn't proven to you, but you might assume that these two fellows were out riding around, drinking beer. Well, what is the level of alcohol, and then I asked the doctor, "What does that indicate to you?" Well, drank about maybe one and a half beers. You see? They couldn't put it together.

I'll tell you, Delma Banks is guilty of one thing and that's not selecting very good friends. Initially Mr. Elliott tells you Delma's going to manipulate somebody? Who is manipulating? Who is manipulating? Folks, I served over ten years in the District Attorney's office. . .

* * * *

[2286] MR. COOKSEY: Notice I did not make one objection while Mr. Elliott was addressing you. Ladies and gentlemen, this in my opinion is one of the poorest investigated cases I have ever seen. I asked the investigator, Officer Huff, did you know Robert Farr was a doper? "No, sir, I didn't know that. Not to my personal knowledge. I didn't know that." My investigator, Dennis Waters, told me that. I asked him.

* * * *

[2287] MR. COOKSEY: You folks knew I couldn't see tracks on his arms from all the way back there, but I said, "You're tracking, aren't you?" "Yes, sir." Talked to him in street language. "You're holding?" "No, sir." He knows the

drug language. He knows the street talk. I ask you, someone like that, is that a credible witness?

Nobody brought us any fingerprints or even the fact that they ever dusted that gun to bring you some fingerprints. If this case had been properly investigated, all of that would have been brought to you, and then the State wouldn't be up here asking for the death penalty on murder. . .

* * * *

[2288] MR. COOKSEY: Asking you to convict a man of capital murder on the word of Charles Two-two Cook. The court says that after you have considered the murder charge, then if the evidence is not there beyond a reasonable doubt to a moral certainty and excluding every other reasonable hypothesis, then you will consider aggravated assault. If that's not there, ladies and gentlemen, it's a verdict of not guilty.

I want to go over some of the evidence, and I want you to see—I think you see what is here. Mike Fisher certainly told you the truth, without a doubt. Patricia [2289] told the truth, without a doubt. And I'll tell you somebody else. The man that Two-two sold the gun to. He wasn't rehearsed. You could look at the witnesses and tell when they have been rehearsed. Even though Two-two says I've never talked to anybody in my life about this case, you know that's not the truth. You know that is not true, because I stood up and I said, "Your Honor, under the rules of law I'm entitled to see the statement that he gave them." He had it. The District Attorney's office produced a statement. That's the way his testimony started off.

Let me tell you another thing, ladies and gentlemen. As I told most of you, it's the lawyer's job to assist the jury in showing some of these witnesses not telling the truth. That's the lawyer's job. All these old pros, you can lean on them, you can do everything you want to do; you're not going to

rattle them. They've got their story down, and they're sticking to it. Let me tell you something. A person can get on that witness chair. You people are sitting here in this jurybox and we had to go back in chambers for some reason or the other; I walked out and Two-two has got his head laying down like that (indicating). He can't look at you jurors. Any time somebody is not facing you, he's holding his head down, that's what it is when the Judge tells you that you can look at the demeanor of a witness. You look at that witness. You see them.

[2290] Let me just ask you this, ladies and gentlemen. Is it a coincidence that Cook is married to a girl from Texarkana? Is it a coincidence that Cook, his wife, and Robert Farr all shoot Preludin? Is it? That puzzle doesn't fit, does it? Is it a coincidence that Officer Huff follows them to Dallas because he has been told that they are going to Dallas in Farr's car, and they go, and they are followed. And they go where? To Two-two's house. Two-two's house. You know, let me tell you what's unreasonable about cars. Dopers have to travel in different cars because the officers get wise to them, who they are, like these folks with known records, and these officers get them a search warrant to run on that doper's car. Now if the search warrant describes the wrong car, the officer has made a bad bust and you can't use that as evidence against him.

Now they've got to change cars and got to change cars, and they've got to change cars frequently. If you run that search warrant out there on a 1976 Chevrolet, and they're in a 1976 Ford or a Mustang, there ain't nothing you can do with them. Folks, did you see Charles Cook's wife when I first started talking to her? First question I asked her, she said, "I don't know what you mean." I said, "Aw, Mrs. Cook." She warmed up, then. She knew I knew that she knew the street language, because she had been convicted on a drug charge. I ask you, does it ring of truth that [2291] Delma Banks would go and tell Two-two this, and Two-two then would continue driving

that car around Dallas? You don't have to leave your common sense in the jurybox. You know why Two-two was running around in that Mustang. You know.

Mr. Elliott says a person—you know, does it ring of truth that Delma drives up there and never seen these folks before, just coincidentally there is a woman there from Texarkana, and Delma goes in with a man he has never seen, hasn't known in his whole life and says, "I killed somebody?" Let me tell you when Two-two almost wanted to tell us the truth. He said, "I went down and I took the gun, and I told Delma, you understand." Baloney. He's going to take the gun because he doesn't want to get in trouble, and yet he's the one driving the hot car around town.

Ladies and gentlemen, you know what we've got, here. Because some terrible thing happened to this sixteen year old child, we want to convict a person that is guilty. What about Two-two? What kind of man is he? Firebombed his own sister's house and he is charged with arson, would kill his own sister.

[2292] MR. COOKSEY: Then he's going to get on the stand and he's going to swear to the truth for you folks, and you good people are supposed to take everything he says lock, stock, and barrel? Mr. Elliott says well, you know, he voluntarily told you all this. He sure did when the police got their hands on him. Then he says, "I'm the one that disposed of the car. I'm the one that disposed of the pistol. I'm the one that sold the battery cables. I'm the one that sold the toolbox." Yet Delma did it. Does that add up to a solid guilty for Delma Banks?

I know, ladies and gentlemen, common sense tells me that all of us want to find somebody guilty for this crime. We do. Certainly. But what really—what really do you have except the fact that Delma was over at the bowling alley and left in

the car with him. What do you have besides that? Except the word of Two-two? The word of Two-two should raise a reasonable doubt in anybody's mind. You know what they've got? They've got that old indictment wrapped around his neck up there in Dallas. He'll tell you anything; he don't want to take no murder rap. Boy, he don't want to take no jury on a capital murder charge with his prior record.

Ladies and gentlemen, I truly hope that you are never unfortunate enough to have to tolerate dopers. I hope [2293] that is a grisly part of our society, grotesque, that you never see. I have seen it.

Ladies and gentlemen, when you and your wife together make two hundred dollars a week, a little over, and that won't even feed your drug habit, you've got to get you some money from somewhere. That's not even that hasn't even started paying the rent and buying groceries and all these other things that you and I work so hard to pay. It takes more income than you bring in for your drug habit. How reliable are those folks, let alone when both husband and wife are takers?

Benny Lee Jones—I couldn't think of his name a while ago. Benny Lee Jones said, "I bought the gun from Two-two and I bought those cables and I bought a toolbox." You know, I feel certain that Mr. Whiteurs thought he was telling you the truth, but Two-two told us he didn't work on Saturday. Worked for the City. And Mr. Whiteurs said "I remember he was there because I had to go up and get him up Saturday morning so he could go to work. I would do anything to help my child or my grandchild." I'm sure Mr. Whiteurs wanted to do that, and was convinced he was telling the truth, but why he didn't know about Charles Cook's trouble is beyond me. He lived there at the house, and he has been in jail since May.

Ladies and gentlemen, the State has told you all [2294] along that they would be able to prove to you capital murder.

I submit to you that they have not. I submit to you that you're on the fringe of a drug cult. I submit to you that these folks that got up here all were convicted. Marcus Jefferson: convicted burgler. Two-two: convicted robber, convicted thief, admitted doper, charged this very moment with arson. Mr. Elliott would have you believe that you don't consider how reliable a man is when he gets up here on the stand. Why, don't you know-don't you know that if Delma Banks had gone up there and said, "Two-two, I killed a man. That's his car, here is the gun I did it with." With his record, if he is trying to go straight, would he go sell that gun? Would he go sell the stuff out of the car? Would he go hide the car? No. He ain't trying to go straight, and he's not trying to be honest with you people. You are the sole judges of the credibility of the witnesses. Credible? Credible? No.

The State, as Mr. Raffaelli told you in his opening statement, the testimony of Two-two is vital. It's vital. It's very important. I guess it was. Only thing they've got is Two-two, uncorroberated statement. That's all they've got. That car needed to be recovered so that that thing could have been dusted and printed, but it hasn't been. Tell me where the evidence is that Delma has ever been in that car in his whole life? Two-two. Two-two. [2295] And brother, Two-two has been there and back. He has been around the block, and he has dealt with cops all of his life and he knows what he needs to do to protect Two-two.

Ladies and gentlemen, as you can very well see, in my examination of these dopers I have a very strong personal dislike. I told each of you that I hope that I wouldn't offend you, and I hope that I didn't when I came down on some of them, but I know what I'm dealing with and I think you people do, too.

Mr. Elliott says throughout this trial on many occasions I wanted to stop and throw up my hands. He sure did. He knew that they were not proving their case. He knew and he banged

the table. And when a lawyer gets that frustrated, he knows he is not meeting his burden.

The only thing, ladies and gentlemen, that the State has brought you is a telephone call from Two-two's residence to Delma's residence on Saturday. Wouldn't it be just as reasonable and just as likely that Two-two called Delma on that telephone? The State hasn't met their burden. They want you to assume that that was Delma calling home. You see? They had Delma's mother and daddy under subpoena. Why didn't they put Mrs. Banks on and say, "Did your son call you?" Now, then, poor old Delma responds to that telephone call and this thing is put in motion. Then Delma goes to Dallas, trusting a doper. Then Delma, from that [2296] minute forward, is hooked. They have taken Delma, a young kid, from a good home, who doesn't know anything about that kind of filth, and they have now got him and they're going to frame him to save their hides. It stinks. It stinks.

Ladies and gentlemen, when you read this Court's charge, you read what the law is, I submit to you when you analyze this evidence and you see who is believable and who is not, I submit that you will return a verdict of not guilty. Thank you very much.

MR. ELLIOTT: May it please the Court?

THE COURT: You may proceed.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: I'll tell you what stinks in this courtroom. I'll tell you exactly, if you're getting a funny smell in here, I'll tell you what stinks. It stinks that we've got a dead boy, sixteen years old, with not one single trace of narcotics in his bloodvein. Nothing to do with dope, whatsoever. That's what stinks. It stinks that we've just listened to a final argument almost a half an hour long that has not touched on the death

of this boy. It stinks that there is an implication that somehow everybody you saw in this courtroom is completely guilty and you know who the only innocent person in this whole house is? [2297] Why, it's Delma Banks, ladies and gentlemen, right there in the flash. The only one in this courtroom totally innocent of any wrong-doing. This is not an effort to tag somebody. This is not an effort to lynch or to go out and latch onto somebody and make them pay for that, but don't you realize how foolish, how stupid and how needless that would be? That would put us on the level of the person that did that to Richard. That would put us on his stupid level. We would be down there with him. That's not what this is about.

Charles Cook is not a suspect in this case. Charles Cook is not a suspect in this case. Drug habits—what evidence of drug habits have you heard? Charles Cook said yeah, I shot. His wife said, yeah, I helped him get them. You didn't hear a habit. You know the only person that you heard was strung out on drugs? Robert Farr. He said at one time he was strung out. Robert Farr is part of Delma's family. He didn't have a thing to do with Charles Cook. There is not one single witness in this entire case that has placed Charles Cook and Robert Farr together. Nobody has ever seen them together, and yet you're supposed to believe that there is some kind of grand conspiracy, and for what purpose? Mr. Cooksey tells you there is another reasonable hypothesis for this. What is it, Mr. Cooksey? You had your turn up here. Why didn't you tell us what the other reasonable Hypothesis was? You talked for thirty minutes. You [2298] say it happened another way. What other way, Mr. Cooksey? It's a conspiracy. Oh, yeah, can't we have a grand conspiracy with the likes of Marcus Jefferson and Robert Farr? Don't we have brillient minds working together? Marcus Jefferson, who walked into this courtroom wearing a T-shirt with the word "Animal" across it. Good mind at work. Good mind.

You are the sole judges of the credibility of the witnesses and the evidence in this case. Ask yourself if we rely on our conviction solely and strictly on Charles Cook, and the answer is no. Charles Cook didn't lead us to Dallas. Delma Banks led us to Dallas. No, that's not a coincidence. That's a lot of good, hard, solid police work. That's a lot of hours sitting and waiting for somebody that you suspect to make a wrong move. We knew who was with Richard on the night he died. Patricia Hicks told us that. Patty Bungardt told us that. It wasn't Charles Cook, was it? Mr. Cooksey says put Delma Banks in that car. Patricia Hicks did that. Patricia Hicks said that Delma got in the car. Mr. Cooksey says dust it for fingerprints. Why? We know he's in there. You have heard testimony to that effect. Patricia Hicks and Patty Bungardt both said they saw him in the car. That proves nothing. He says why didn't you get fingerprints off the beer cans? Well, the weather was inclement. It was snowing and it was raining. Think about that, folks. Think about the life expectancy of a fingerprint in the snow and the rain, if you [2299] will.

All this dope, all this talk—and that's all it is. It's talk. It's not evidence of dope. Nothing to do with this boy. Not one single stitch of evidence that this boy had anything whatsoever to do with narcotics. It's like I told you, folks. The issue in the case is who killed Richard Whitehead. Dope had nothing to do with it. But you have evidence; you have Delma saying, "I was sitting out there drinking the beer, and I was going to kill the kid for the hell of it and take his car." That's what you've got.

He says does this chance meeting on a Dallas street ring of truth? Isn't it a coincidence. Folks, if this is contribed and we're making this up, don't you think we would have done a better job? Don't you think we would have gotten somebody besides Charles Cook, if this is all a grand conspiracy against Delma Banks? I would love to have put somebody on that stand that does not have a criminal record and say, "Yes, I

heard him confess. I heard him say it." Didn't happen that way. I'm sorry. We brought you what we had, but bear in mind that the people that appeared here today did not appear because of our choosing. Delma sought them out. Delma Banks got in the boy's car that he had just killed, and drove to Dallas, and that brings us to an interesting point, and that is the car. We haven't shown you any evidence whatsoever that the Whitehead boy was killed and his car was taken. Well, folks, we have showed you evidence that the Whitehead boy was killed, and guess who showed up in the car? Delma Banks.

Let me correct one thing. Charles Cook, his wife, and Robert Farr did not tell you that they all shot Preludin. Robert Fair said Dilaudid. Okay? It's a little thing, but its the little things that count, folks. Mere circumstances.

THE COURT: You have five minutes.

MR. ELLIOTT: Thank you, Your Honor. We do not depend upon mere circumstances for conviction. Delma Banks is sitting there, talking about killing a white kid in Texarkana and shooting him three times in the head, and there is the exact description of that murder. It's not a circumstance. Then he is seen by Charles Cook, Charles Cook's wife, Carol Cook, Mr. Whiteurs, driving the dead boy's car; that's not a circumstance. That he leads Dallas police officers over there after that weapon is not a circumstance. Of course Delma is just being manipulated, isn't he? Who is doing the manipulation? These masterminds, Robert Farr and Marcus Jefferson, the T-shirt with "Animal" written on it. They look like the type of cunning mind that you could see manipulating an innocent person.

Mr. Cooksey says that this is a poor case. Why do you think he says that? Can you discern a motive why Mr. Cooksey wants to call this a poor case? You're right. He's right, really, when he says don't leave your common sense at

home. Think about why Mr. Cooksey would want to call this a poor case. Drugs, all these rabbit trails, all these smoke screens that he wants you to hide behind and chase down. He wants you to think about anything except that sixteen year old boy with three bullet holes in him. Anything at all. The State has produced the only evidence in this case.

* * * *

MR. ELLIOTT: The point is this. Mr. Cooksey's opinions are not evidence. Mr. Cooksey's questions are not evidence. Mr. Cooksey's fine argument is not evidences. That is not evidence. Talk is not evidence. I am sick to my heart to think that we could produce this much proof and stand here and doubt as to whether or not the State has proved its case. We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County. You've been put to a hard task, and that is the task of doing what is right. It's an old task, but it's in you. The hand of God is upon our country and in our laws and I ask you to stand up for what's right. I ask you to come forward for what's right and what's good and what is worth preserving in our society. I ask you to do what's right. Return a verdict based on the evidence in this case, consider the evidence in this case, and it can lead but to one conclusion and that is that Delma Banks is guilty of capital murder. I want you to go from this place proud and holding your head high. I want you to go from this place with courage. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed.

* * * *

VETRANO JEFFERSON

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

THE COURT: Mr. Raffaelli, you may proceed.

Q Thank you, Your Honor. State your name, please, sir.
A Vetrano Jefferson.

* * * *

Q Thank you. Mr. Jefferson, where do you reside?
A Sir?
Q Where do you live?
A 2324 West 18th.
Q How old are you, sir?
A Twenty.
Q And, Mr. Jefferson, do you have a sister who is the wife of Delma Banks?
A Yes, sir.
Q Okay. Let me direct your attention to the early part of April, around April 7th of this year, and ask you if you and Delma Banks had an argument or quarrel that day, please, sir?
A Not really.
Q Did not?
A No.
Q Okay, sir. Did you file a . . .

* * * *

Q Okay, sir. Did you and Delma Banks have an altercation or a fight back in the early part of April?

* * * *

Q Thank you. Did you and Delma Banks have a fight back in the early part of April?
A Yeah, kind of a fight.
Q Kind of a fight?
A Um-hum.

Q Okay. I notice on the left-hand side of your face, approximately here, Mr. Jefferson (indicating on his own face), there is a scar. Could you turn a face the jury, please, sir?
A (Witness turns.)
Q When did you receive that scar?
A It was the night that he came over there.
Q Came over where?
A Over to my house, rather.
Q Okay, who put that scar upon you?
A Delma Banks.
Q How did he inflict that scar, sir?
A With a pistol.
Q Could you tell us how he did it?
A He had the gun, butt part in his hand, and hit me across the face with it.
Q Okay, sir. Did that occur inside the home?
A Yes, sir.
Q Did you leave your home at that time or shortly after that?
A After I got hit, I were going outside to get in my car and go to my mother's house.
Q Okay, did he follow you outside?
A He went out before I did.
Q Okay, while you were outside did he threaten you?
A Yes, sir.
Q What did he threaten to do, if anything, sir?
A He told me that he would—he was going to kill me, you know, because he thought I was going to reach in the car for something.
Q Okay.
A Which I was going in there to get a screw driver to start my car with, because it wouldn't work on account of the switch.
Q Did your sister step in front of you two and break the fight up, and that ended it?

A Yes.
Q And that occurred in April of this year? Is that correct, sir?
A Yes, sir.
Q Pass the witness.

* * * *

CROSS EXAMINATION

BY MR. COOKSEY:

Q Vetrano—excuse me, Your Honor.

THE COURT: You may proceed.

Q Are you still in jail?
A Yes.
Q I pass the witness. Let me ask you this, Vetrano. When you say that Delma threatened you, he thought you were reaching in your car to get something?
A Yes.
Q Pass the witness.

MR. RAFFAELLI : I have no further questions.

* * * *

[2319] ROBERT FARR

a witness recalled by the State, still being upon his oath, further testified as follows, to-wit:

RE-DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q State your name again for the record, please, sir.
A Robert Farr.
Q And you are the same Robert Farr that has previously testified, are you not?
A Yes.

* * * *

Q Okay Mr. Farr, directing your attention to the latter part of April of this year, I believe you previously testified that you and Marcus Jefferson, I believe, and Delma Banks went to Dallas, Texas. Is that correct, sir?
A That's correct.

* * * *

Q State your name again, please.
A Robert Farr.
Q And, Mr. Farr, as I was previously saying, you are the same Robert Farr that testified previously in this trial, are you not?
A Yes.
Q And I believe you stated that you, Marcus Jefferson, and Delma Banks went to Dallas, Texas with—during the latter part of April. Is that correct, sir?
A Yes.
Q What was the purpose of going to Dallas at that time?
A To pick up a pistol.
Q Okay sir, and did y'all pick up a pistol?
A We did.
Q Who went and got that pistol?
A Who went and got the pistol?
Q Yes.
A Delma got the pistol.
Q Did he go up to the front porch, himself?
A Yes, he did.
Q Whose pistol did y' all go after?
A His pistol.
Q What statement, if any, did he make when he returned from the car—I mean from the porch?
A He said,"Will this do?"
Q Now. . .

* * * *

A He said, "Will this do?" And, he said his gun was over in West Dallas; that Two-two had let some woman have his gun over in West Dallas.

Q What did he mean by the statement, "Will this do?"
A Going to go pull a robbery, I guess.

* * * *

Q What did he mean by the statement, "Will this do?"
A He said would this do, because the gun that we went after, it was a small type of gun and we needed a small type of gun.
Q What did you need a small type of gun for?
A To conceal it.
Q Okay, sir. After you were driving away, what did he tell you to do with the gun that you had retrieved from that porch?
A He asked me to load it.
Q What type of gun was that?
A .22.
Q Did you load it?
A No.
Q What did he say, if anything, that y'all were going to do at that time?

MR. COOKSEY: Your Honor. . .

A He didn't.

* * * *

Q What were y'all going to do at that time? Let me reword that. What did he want to do at that time?
A I don't know. We were going to pull some robberies on the way back.
Q Okay, in other words you were going to pull a robbery on the way back. Now what do you mean—where were you going to, on the way back where?
A To Texarkana.
Q How many of you had guns?
A No one; there was only one gun.
Q Who had that gun?
A Delma had the gun, but the gun was in the car.

Q Did you ask him or make inquiry, what if there was any trouble during these burglaries, what he would do?
A Yes, I did.
Q What did he say, if anything?
A He said he would take care of it.
Q How did he say he would take care of it?
A He didn't go into any specifics, but he said it would be taken care of.
Q Okay, sir, and—pass the witness.

CROSS EXAMINATION

BY MR. COOKSEY:

Q Robert, y'all went to Dallas in your car, didn't you?
A We did.
Q Before you left here, you called Willie Huff and told him you were going to Dallas, didn't you?

MR. RAFFAELLI: Your Honor. . .

A No, I did not.

* * * *

Q Robert, didn't you call Willie and tell him you were taking Delma to Dallas?

A I did not.

Q Well, tell the jury this, Robert. Did you go up in Arkansas last week and bust some phony scripts?
A No, I did not.
Q You didn't almost get in a fight with a doctor in Arkansas last week because he wouldn't prescribe some dope for you?
A No. I asked him for the medication, he wouldn't give it to me, and that's all it was.
Q There wasn't a black man with you that had to apologize to the doctor and try to get you out of there?

A Not that I know of. There was a black man with me, but wasn't no apologizing to a doctor. I didn't know anything about that.

Q Robert, didn't you bust some bogus scripts in Arkansas last week?

[2328] A No.

Q And that testimony is just as true as all this that you say about Delma, isn't it?

A That's right. I did not bust any scripts in Arkansas last week.

Q And you know that you're drawn up tight over that, and you're going to testify to anything anybody wants to hear, aren't you, Robert?

A Can you prove it?

Q I asked you a question, Robert.

A No, can you prove it?

Q Did you . . .

A I did not crack no scripts in Arkansas last week.

Q Your Honor, would you instruct this witness to answer my questions?

THE COURT: You may answer his questions, and you are directed to answer his questions.

A No, I did not bust any scripts.

Q And the truth of the matter is, Robert, you went to Dallas in your car and you got Delma to go, and Robert, when the cops got you up there, you were holding narcotics then, weren't you?

A No.

Q Well, what about your narcotic paraphernalia?

A I was holding a syringe when they stopped me, but I was not holding any narcotics.

Q Did you get busted for possession of narcotics paraphernalia?

A Did I get busted?

Q Yes, sir.

[2330] Q Robert, you told Delma to go to Dallas, that you had a friend up there that had a gun that he wanted y' all to keep, didn't you?

A That's not true. When we were stopped, I told the officers that that was my syringe.

Q Did they bust you for it?

A No, they didn't file no charges on me.

Q Did they take you to jail, Robert?

A Yeah, they took me to jail.

Q After they took you to jail, and after they got your paraphernalia . . .

MR. ELLIOTT: Your Honor, we would object.

Q . . . they did not charge you?

MR. ELLIOTT: He has asked the question that the Court allowed, and now he is going further.

THE COURT: I'm going to sustain the objection.

Q I may not pursue that line of questioning, Your Honor.

THE COURT: You may not pursue it because he answered that they did not bust him, as I understood the witness's testimony.

Q Robert, so that you and I are real cost, did you bust any script over in Arkansas in the last few weeks?

[2331] A No.

MR. ELLIOTT: We would object to that as being improper impeachment, Your Honor, and irrelevant to this trial.

THE COURT: Mr. Cooksey, I don't see that this is relevant to this particular trial.

Q Your Honor, I am attempting to show this jury why this man would get up and tell these things, and that this man is not worthy of belief. That he has a reason to protect himself

from all these charges, and of course that's why he is going to testify like he is.

A Mr. Cooksey. . .

THE COURT: Well, now. . .

A . . . I have only been back here three weeks.

THE COURT: No outbursts from the witness until the question is asked. Okay? And I will instruct the jury to disregard any statement that the witness might have made which was not in response to the question. You will completely disregard it. I did not hear it, I don't know what it was, but you are to disregard it. Now I'm going to sustain the objection made by the State to the line of questioning as defense counsel is pursuing.

Q Note my exception.

THE COURT: All right, sir.

[2332] Q Do you know James Kelley?

A Yes, I do.

Q And James Kelley, was he with you when you went up to the doctor's office?

A He was.

Q Was James Kelley with you when you busted some script?

A I did not bust any script.

Q Okay. I just wanted to get your answer. Do you know Gary Owens?

A I do.

Q How do you know Gary?

A Because he's a narcotics officer.

Q In Arkansas?

A Yes.

Q Did you snitch for him?

A No.

Q You've been in a gunfight, haven't you, Robert?

MR. RAFFAELLI: Objection, Your Honor.

THE COURT: I'm going to sustain the objection.

Q Robert, did your wife shoot you?

A No.

* * * *

[2338] DELMA BANKS, SR.

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.

A My name is Delma Banks.

Q You are Delma, Sr.

A That's right.

Q Where do you live, Mr. Banks?

A I live at Nash.

Q And are you employed, sir?

A I have a j ob at Red River.

Q I'm sorry, I didn't understand you.

A I said yes, I have a job at Red River.

Q All right, sir, and what is your wife's name?

A Allean Banks.

Q And how many children do you have, Mr. Banks?

A Six.

Q And Delma, Jr. is your son, isn't he?

A That's true.

Q What kind of education does Delma have, Delma, Jr.?

A Well, this was his last year in school, and he had a few months and he was going down here to Dunbar to finish. He had about two quarters, I believe it was, one or two quarters, that he was lacking before he finished high school.

Q Okay, and tell the jury what kind of son [2339] Delma has been to you, Mr. Banks.

A Well, he has been a nice son. He always obeyed me, and he got in a little trouble back and forward but it didn't amount to much because we didn't allow him to get with the wrong bunch, you know. And so I say he was a real nice kid because he grew up in church; and sometimes people grew up in church just strayed off, so this way he just got with the wrong bunch.

Q All right, sir. Mr. Banks, are you asking this jury to save your son's life?

A Sure is, please. Begging. I don't think he will do nobody no harm. As a matter of fact, I know he won't.

Q Where does Delma fit in the line of your six children?

A Well, the way I—I try to have a little love for all of them. I don't . . .

Q But I mean age-wise, Mr. Banks.

A Age?

Q Yes, sir.

A Well, he's the oldest. I mean next to the oldest, because I have an older daughter.

Q You have a girl?

A Girl.

Q And then Delma, Jr.?

[2340] A Then Delma, Jr. He is next to the oldest.

Q How many children do you still have at home?

A I have four at home.

Q All right.

A Well, five, with him. See, he was living with us from time to time.

Q Anything else you would like to tell this jury, Mr. Banks?

A Well, I can't think of anything to tell them. I just hope that they will spare my son's life, please.

Q Pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Banks, you love your son very much, don't you?

A Quite sure everyone does.

Q You would do anything you could to help him, wouldn't you?

A Not if it was wrong, I wouldn't.

Q Not if it was wrong?

A No, I don't hold up for nobody, no wrong.

Q Nothing further.

* * * *

[2357] THE COURT: Let the record show that this hearing is held in Judge's chambers, outside of the presence and hearing of the jury, the jury having been recessed for lunch. In the Judge's chambers are the defendant, defendant's counsel, defendant's counsel's investigator, the court reporter, and the Judge.

MR. COOKSEY: Delma, as you know, last night at about 11:00 o'clock, a little after, the jury in this case came back and found you guilty of capital murder. You understand that, don't you, Delma?

DELMA BANKS, JR.: I understand they said I was guilty.

MR. COOKSEY: Okay. We are now in the punishment phase, and, Delma, I want you to understand that under Texas law as it is today, the jury can only assess one of two authorized punishments by law. One is a life imprisonment sentence, and one is the death penalty. You understand that, Delma?

DELMA BANKS, JR.: (No audible response.)

MR. COOKSEY: You have to speak up. She can't take your head nod.

DELMA BANKS, JR.: Yes.

MR. COOKSEY: We at this point are putting on our witnesses in the punishment phase. I think, [2358] Delma, in all honesty that we can hurt you by putting on any more preachers and ministers, pastors, Rabbi's or Fathers. I think that the jury is going to get too much of it; they are going to get overexposed to it, and I think that it could hurt you. But all those people you have out there, if you desire, I will call them to the last person. You tell me what your wishes are.

DELMA BANKS, JR.: I don't understand.

MR. COOKSEY: Well, Delma, what I'm saying to you is if I keep calling preacher after preacher after preacher after preacher, I think that they're going to backfire on us. I think it's going to backfire on us. I think you can overexpose a jury to that. Now that is just my opinion, from my years of experience.

DELMA BANKS, JR.: All right.

MR. COOKSEY: What I'm saying to you, though, everybody you've got on that list, I will call if you want me to.

DELMA BANKS, JR.: Just pick the right ones out?

MR. COOKSEY: Well, who do you want me to call? You know these folks a whole lot better than I do.

THE COURT: Is he gone after a [2359] list (indicating Mr. Waters)?

MR. COOKSEY: Yes, sir.

THE COURT: You might have him to go over the list and look it over and see which ones you want him to call.

MR. COOKSEY: Delma, at this point we have called your daddy, we have called Reverend Ford, Reverend Gullette, Reverend Lewis. Okay? And Mr. Frank McGill. You have left on your list Curtis Dismuke, J. M. Williams, E. Fields, Roosevelt Hyman, Louis Austin, Mary Davis, and George McGraw. Now, Delma, I want to tell you that in my opinion I

think you should put your mother on the stand. I think you should add your mother to the witness list. Okay?

DELMA BANKS, JR.: All right.

MR. COOKSEY: What I want to know is out of these people listed on this yellow sheet that I have just named, who in there, since I don't know these people, I don't know any of those people, I don't know how well they know you and how long they have known you. You know that. You know them a lot better than I do. Who on this list do you want me to call?

DELMA BANKS, JR.: None of them, I guess.

MR. COOKSEY: Why not?

[2360] DELMA BANKS, JR.: So it won't influence the jury.

MR. COOKSEY: Well, we want to influence them a little.

DELMA BANKS, JR.: Not influence. May be a little bit like you were saying a while ago.

MR. COOKSEY: Who are all these people?

DELMA BANKS, JR.: Pastor, cousins.

MR. COOKSEY: Is Mary Davis a relative?

DELMA BANKS, JR.: Friend. George McGraw, his son used to go with my sister.

MR. COOKSEY: What does he do for a living?

DELMA BANKS, JR.: He's a preacher. He was, I don't know if he still is or not.

MR. COOKSEY: Just tell me, Delma, who on this list you want me to call.

DELMA BANKS, JR.: Nobody.

MR. COOKSEY: You're sure?

DELMA BANKS, JR.: Yeah.

MR. COOKSEY: Your Honor, would you explain to my client his right to call people? What is the—I can't ever remember this guy's name, out here. We've [2361] got to call him. James Kelley. Now, Delma, James Kelley is a witness that we have dug up, who will testify that Robert Farr hired him and they went up into Arkansas, and Robert passed a bunch of forged prescriptions for drugs; and that he went in this doctor's office, and finally James Kelley heard him and he and a doctor were just about into a fight and all that, and that will discredit Robert Farr. You see?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: I think we have got to call James Kelley.

DELMA BANKS, JR.: All right.

MR. COOKSEY: We've got to call your mother.

DELMA BANKS, JR.: Okay.

MR. COOKSEY: And is there anybody else you want to call?

THE COURT: You understand you can call all of those people to testify or none of those people to testify or any part of those people to testify? You understand? These are character witnesses. Now you know what a character witness is. They don't know anything about the facts of the case. They have known you, and their purpose of being on the stand is to talk about your character, when they knew you, whenever. You understand that?

MR. COOKSEY: Speak up, now.

[2362] DELMA BANKS, JR.: Yes, sir.

THE COURT: Now do you want your attorney to call any of those, other than the two he was mentioning, your mother and whoever the other fellow is, Kelley do you want him to call any more character witnesses on your behalf?

DELMA BANKS, JR.: No, sir.

THE COURT: I mean the main thing—again, I don't care whether you call them or you don't call them. You understand that? Just so long as you understand that you have a right to call these or anybody else that you want to call as a witness.

DELMA BANKS, JR.: Yes, sir.

THE COURT: whether they are on this list or not, we'll stay here and let you call anybody that you want to, or as many as you want to. You understand that?

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. That's all that this court is interested in, that you just fully understand this.

MR. COOKSEY: Delma, you're telling the Judge you fully understand that you can call these people? You understand that?

DELMA BANKS, JR.: Yes, sir.

[2363] MR. COOKSEY: And you say that the only ones you want to call now are James Kelley and your mother?

DELMA BANKS, JR.: Yes, sir,

MR. CCOKSEY : Now, Delma, do you remember in the first part of this trial where I explained to you that you had the right to testify, but you didn't have to testify?

DELMA BANKS, JR.: Um hum.

MR. COOKSEY: That it was your decision, and your decision, alone?

DELMA BANKS, JR: Yes, sir.

MR. COOKSEY : Now, Delma, at this phase of it, at this point, it has now come tine again for you to make an election and a decision; just as it was in the first phase of this trial, in

this part you can either testify on your own behalf, but you certainly don't have to. You understand that?

DELMA BANKS, JR.: Yes.

MR. COOKSEY: Now fully understanding that, what is your desire as far as testifying in your own behalf or not testifying?

DELMA BANKS, JR.: I'll testify.

MR. COOKSEY: All right, now you understand that you don't have t o testify, don't you?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: And nobody can make you testify. Right?

DELMA BANKS, JR.: Right.

MR. COOKSEY: But it is your decision that you desire to get on the stand and testify?

DELMA BANKS, JR.: Yes, sir, it is.

MR. COOKSEY: Okay, sir. Your Honor, I am totally convinced that my client understands his rights in that regard, and his right to call witnesses.

THE COURT: Let me inject this, to be sure that he understands.

MR. COOKSEY: All right, sir.

THE COURT: Now you understand if you testify, that the State has a right to ask you some questions, too? You understand that?

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. In other words any time, Delma, any time that you take the stand, both sides—or any witness takes the stand, as you have seen it in this trial, if the State puts on the witness, then your attorney had a right to ask them some

questions. If you take the stand, they have the right to ask some questions. If you take the stand, they can ask you some questions, too. Do you understand [2365] that?

DELMA BANKS, JR.: Um-hum.

MR. COOKSEY: Speak out, now.

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. Now again, the only thing that the Court is here for, is not trying to influence you to take the stand or not to take the stand. This is a decision that you, yourself, make; but all the Court is interested in doing is that you fully understand what your rights are and what your options are, and the procedure that is followed. I want you to understand that, and are you telling me you understand what the procedure is, as I explained it to you?

DELMA BANKS, JR.: Yes, sir.

THE COURT: All right.

MR. COOKSEY: All right. Now, Delma, let me tell you this. The State will be somewhat limited in their cross examination of you. You see, this jury has already found you guilty of killing Richard Wayne Whitehead. They may not interrogate you about that, because that issue has been settled by this jury, but they can ask you about you getting into it with Vetrano Jefferson. They can ask you about planning armed robberies. They can ask you about all that stuff, and realizing that, do you still desire to take the stand and testify in your own behalf?

[2366] DELMA BANKS, JR.: Can I have an opinion from you?

MR. COOKSEY: Well, yes, Delma, I will give you my opinion. I am honestly of the opinion that if the jury does not hear from you somewhere, and if they don't see a tear, like I see right now, it is my opinion that they will inflict the death

penalty. They will vote in such a way as to require the Court to impose the death penalty. That is my honest opinion. That opinion could be wrong, but that is my honest opinion.

DELMA BANKS, JR.: I know I want to testify.

MR. COOKSEY: Now I can't guarantee you that even though you testify, that they're not going to give you the death penalty. You understand that, don't you?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: So realizing all that, do you still-I mean the Judge has no control over this jury. I have no control over this jury. They simply have to answer those questions. Okay?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: So realizing all that, do you still desire to testify?

DELMA BANKS, JR.: I sure do.

MR. COOKSEY: Okay. Delma, is [2367] there anything at this point that you feel like you don't understand?

DELMA BANKS, JR.: Yes.

MR. COOKSEY: What?

DELMA BANKS, JR.: On the circumstancial evidence.

MR. COOKSEY: On circumstancial evidence?

DELMA BANKS, JR.: Um-hum.

MR. COOKSEY: What is it you want to know?

DELMA BANKS, JR.: The way the example that you was giving, you know, during—like I say, I don't know nothing about this, and I just remembered it, and on the example you was giving, I didn't see none of that. I didn't see them rule out none of that.

MR. COOKSEY: Well, that's not for us to see. The jury has total discretion in finding the facts in any case. I mean the Judge can only instruct the jury in matters of law; the attorney can only present their talks or arguments or summation to the jury, and the jury can determine the facts to be any way they want to determine them. The jury says that you shot and killed Richard Wayne Whitehead. That fact is established.

DELMA BANKS, JR.: I-well, I guess [2368] it is, but if they didn't find nothing in my possession, how they find me guilty?

MR. COOKSEY: That's correct. They believed, apparently, the testimony of Two-two, Charles Cook. Okay?

DELMA BANKS, JR.: All right.

MR. COOKSEY: Anything else you would like to ask me?

DELMA BANKS, JR.: No, sir.

MR. COOKSEY: Anything you want me to do for you, other than present these other witnesses?

DELMA BANKS, JR.: Nothing that I can think of.

MR. COOKSEY: Okay.

THE COURT: All right.

MR. COOKSEY: Thank you, Your Honor.

THE COURT: You're welcome.

(At this time the noon recess was observed by all parties, after which the jury was returned to open court, all parties were present, and the following proceedings were had, to-wit:)

* * * *

JAMES KELLEY

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.
A My name is James R. Kelley.
Q Where do you live?
A I live at 2319 West 18th Street.
Q Is that in Texarkana, Texas?
A Yes, sir.
Q How old are you?
A Twenty-eight years old.
Q James, do you know Robert Farr?
A Yes, sir.
Q How do you know Robert?
A Well, he and I, we go with two sisters.
Q Did you and Robert take a little trip though Arkansas recently?
A Yes, sir.
Q Tell the jury about that.
A He hired me to take him to Nashville, Arkansas. Said that he wanted to go down there and get a prescription filled, and I carried him down there and we got down there and he asked me if I would set in the car, so I set in the car, you know, and he went in there and stayed a little while so, you know, I got tired of setting in the car and I went inside the hospital there and when I got in there, him and the doctor was fussing a little bit and the doctor told him to get on out of there.

Q The doctor actually used some profanity, didn't he?
A Yes, sir.
Q Told him to get his ass out of there, didn't he?
A Yes, sir.
Q And what did you do?

A I told—I asked Robert what was going on, you know, because I didn't really know, you know, what he—you know, what he had done, and I asked him, I said, "What's wrong?" He said, "Nothing, man." That he was—the doctor told him to take his papers and go. He said—he asked the doctor was he going to let him have the stuff, and the doctor told him, said, "No, you got all you're going to get. Just get out of here."

Q All right, did you apologize to the doctor?
A I told the doctor that I didn't know what was going on, and the guy had hired me to bring him down there.
Q Where did you and Robert go after that?
A Went to DeQueen, Arkansas.
Q What did you do at DeQueen?
A Went to another hospital, and I sat outside again and waited on him, you know, and he went in there and he stayed in there about two hours, I guess, and then I went inside in another part of the hospital and sat down in there and waited on him until he come out.
Q Where did you go then?
A We left there and went to Ashdown.

* * * *

Q You went to Ashdown?
A Yes, sir.
Q What occurred at Ashdown?
A We went to Ashdown Hospital, and when we got there—we went there, it was a nurse or something standing on the porch out there, and he asked her if some doctor was in there, or something, and she told him no. So he, you know, come on back to the car, and then he wanted me to take him somewhere else and I told him, you know, I hadn't eaten anything all that day and I didn't have any money, so I was trying to get back home off the little gas that I did have, because I didn't think that he had any more money either, you know.

Q All right, did he make any statements to you on the way home?

A Well, he was just—he talked about, you know, telling me about his wife, his old lady; said that he was, you know, thinking about just going back to Oklahoma, and he said that he didn't know whether they was going to be able to make it, or something, and he said that he was going back to Oklahoma. And then we got on talking about Delma, you know, and he just . . .

* * * *

Q Now, James, what did Robert say?

A Well, you know, he just—he told me about when they went to Dallas, and all this. He said that, you know, he said that Delma didn't do that and they just—you know, he just told me just like that. He said, "Delma didn't kill that boy, Kelley." And I asked him, I said, "How do you know?" You know, so he didn't—you know, he wouldn't talk to me no more about it.

* * * *

Q James, did Robert make any reference to obtaining some stuff? Did he say anything about getting some stuff?

A He said whenever—he said that he was going to get what he was after before we got back to Texarkana.

Q Did he say he had to have the stuff?

A Yeah, he said he had to have it before we got back to Texarkana.

Q I pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q James, are you nervous?

A Yes, I'm nervous.

Q You're telling the truth, aren't you?

A Yes, sir.

Q Then why are you nervous?

A I'm always nervous like that, around a bunch of people.

Q Do you need something to settle down your nerves a little bit?

A No.

Q You don't need anything?

A No.

Q You don't use drugs, yourself?

A Depends on the type of drug.

Q All right, why don't you tell us about the type of drug.

A I don't know too much about drugs.

Q You don't?

A No.

Q What did you go to Arkansas for?

A I carried a man up there, but he paid me. He hired me.

Q And you said you didn't know what he was up there for, didn't you, James?

A I did not know what he was up there for.

Q Even after you went in the hospital and got him and drug him back out, you didn't—you still didn't know what he was up there for?

A I knew what he was up there for then.

Q And you stayed with him, didn't you?

A Stayed with him?

Q You kept toting him around, didn't you?

A The man had paperwork to go in and see a doctor, and that's as far as I know that he had.

Q And you didn't think there was anything strange about you having to go in the hospital and drag him out?

A I didn't have to drag him out. I just went in and asked him what was wrong, and he said everything was all right.

Q And you went from doctor to doctor to doctor to hospital to hospital to hospital, and you drove that car, didn't you?

A That's right.

Q And you're up here testifying today because you're a good citizen, aren't you?

A Well . . .

Q Why are you up here, James?

A Why am I up here?

Q That's what I said.

A I'm here because Robert—this is what he said.

Q Because that's—you're here because of what? Did Robert ask you to be here?

A No, he didn't ask me to be here.

Q Who asked you to be here?

A I was just here last night, and my old lady was here, and . . .

Q Who asked you to come to court this morning? I want an answer.

MR. COOKSEY: Your Honor. . .

A I asked myself to come.

* * * *

Q That's all I want to know. Who subpoenaed you up here?

A Who subpoenaed me?

Q Yeah.

A They—well, when I was here last night, I talked to the Sheriff and they—he subpoenaed me.

Q Whose sister do you go with?

A I go with Marcus Jefferson's sister.

Q Is there any relationship between Marcus Jefferson's sister and Delma Banks?

A And Delma Banks?

Q Yes.

A Well, Delma Banks go with one of her sisters.

Q That's right. You're part of the family, aren't you?

A No, I'm not part of the family. I'm not married. I say I go with her.

Q Where were you on or about April 12,1980?

A Where was I what, now?

Q April 12, 1980.

A April 12, 1980?

Q Yeah.

A I don't really know.

Q Were you with Delma Banks?

A No, I was not with Delma Banks.

Q Do you know anything about this case on trial here?

A No, sir.

Q You can offer no personal knowledge with regard to this case on trial here, can you?

A No, sir.

Q You don't know a thing, other than you toted Robert Farr around for a little money, and that's all [2379] all you know?

A That's about the size of it.

Q That's right. That is about the size of it.

* * * *

GARY OWEN

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.

A Gary Owen.

Q Mr. Owen, how long were you with the Arkansas Police Department?

A Approximately ten and a half years.

Q Were you ever in the Criminal Intelligence Division?

A Yes, sir, around nine years of that time.

Q Mr. Owen, do you know a man by the name of Robert Farr?

A Yes, sir, I do.

Q And do you know him from your police work.
A Yes, sir, I do.
Q Is Robert Farr a doper?
A Yes, sir, he is.
Q How long have you known Robert?
A I have known Robert approximately seven to eight years, somewhere along in there.
Q Everybody in the Police Department, especially the Criminal Division, knows him, don't they?

* * * *

[2380] Q How long have you known him?
A Around seven to eight years.
Q Have you delt with Robert on many occasions?
[2381] A Yes, sir, I have.
Q Let me ask you this, sir. Is Robert Farr a truthful person?
A No, sir, he is not, in my opinion.
Q Would you believe Robert Farr under oath?
A No, sir, I would not.
Q Pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Owen, what are your duties with ID, or what were they?
A What were my duties?
Q Yes.
A I was in Investigation, I was over Intelligence, and I have been Supervisor of Narcotics and Vice.
Q Narcotics. Did you ever use Robert Farr?
A Yes, sir, I did.
Q Did he give you good information?
A No, sir.
Q How long did you use him?

[2382] A I never did use him but once or twice, and his information was not correct and I didn't use him any more.
Q You didn't rely on Robert Farr at all?
A No, sir, I did not.
Q In other words one tine the information that he gave you was wrong, and so you're willing to sit here on that stand and say based on that one time, you don't believe anything he says?
A I didn't say one time, sir. I said two or three times, and I never used him any more.
Q Well, now we're up to two or three. What did you use him? One? Two? Three?
A Two or three times.
Q Is that the limit of it?
A That's the limit of it.
Q Who do you work for?
A I'm not employed at this time. I'm fixing to go into business for myself.
Q Who are you seeking employment with?
A I'm fixing to go into business for myself.
Q What kind of business?
A Polygraphs.
Q Who are you going to work for then?
A Myself.
[2383] Q Who are you going to work in conjunction with?
A With businesses I can get the business from.
Q Have you contacted Dennis Waters?
A Have I contacted him?
Q Yes.
A Yes, I have talked to Dennis several times.
Q You're wanting to do some business with Dennis Waters, aren't you?
A Yes.
Q And you want Dennis Waters' good favor, don't you?
A Yes, sir.
Q I think you got it.

RE-DIRECT EXAMINATION

BY MR COOKSEY:

Q Mr. Owen, has—to your knowledge has Robert Farr ever been shot?

A Yes, sir, several years ago, I believe.

* * * *

A I believe it was several years ago, he was shot in the head. Mr. Cooksey.

Q All right, did his wife shoot him?

A I believe that's correct.

Q What about . . .

MR. ELLIOTT: May we take this witness on Voir Dire, Your Honor?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. ELLIOTT:

Q Do you know any of this of your own personal knowledge, or is it just what you have heard?

A I believe I . . .

Q Don't tell me what you believe. Do you [2385] know it of your own personal knowledge? Did you see it?

A No, I did not.

* * * *

RE-DIRECT EXAMINATION

BY MR. COOKSEY:

Q Do you know of your own personal knowledge Mr. Owen, whether Farr has a criminal record in Arkansas?

A He was arrested in '73, for forgery and uttering.

Q Thank you, sir.

MR. ELLIOTT: Nothing else.

THE COURT: You may step down and go back outside. Call your next witness.

* * * *

DELMA BANKS, JR.

[2389] a witness called on behalf of the Defendant, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. COOKSEY:

Q Your name is Delma Banks, Jr.?

A Yes, sir, it is.

Q Delma, you are the defendant in this case?

A Yes, sir.

Q You understand, don't you, Delma, that this jury has found you guilty of capital murder?

A Yes, sir—not really, I don't understand.

Q Well, I know you don't understand, Delma, but I'm saying that this jury has. You know that?

A Yes, sir.

Q And, Delma, you have been in these proceedings and you knew, just as these jurors know, that the jury only has two options open, don't you?

A Yes, sir.

Q Which will result either in a life sentence or a death sentence.

[2390] A Yes, sir.

Q Would you tell the jury, Delma, that you want to live?

A I do.

Q Would you tell them why?

A Because no one wants to die; at least I don't, especially for something I didn't do.

Q Delma, that's beside the point. This jury has found now guilty, and it's now time for them to assess punishment. Would you tell this jury why you want to live?

A Because I want to live.

Q Delma, you have never before been convicted of a felony, have you?

A No, sir.

Q Did you and Robert Farr plan some robberies?

A Robert Farr planned those, sir. He robbed them.

THE COURT: Just a minute. This juror says she can not hear, so you'll have to speak up a little louder so that the jurors—I have this turned all the way up, but you'll have to get a little closer or speak up.

Q Did you ever plan to rob anybody, Delma?

A No, sir, I haven't.

Q When you went to Dallas, Delma, and Robert [2391] Farr was with you, whose car were you in?

A Robert's.

Q Who came and got you, to go to Dallas?

A He did.

Q Did you drive Robert to Dallas at his request?

A No, he started driving and he was kind of high, and he was nodding out and he would go to sleep and close his eyes, and I told him it would be best for me to drive so we didn't get hurt on the way. That's the reason I ended up driving the car.

Q Was it your idea or Robert's idea to go to Two-two's house?

A My idea to go get the gun.

Q Why were you going to go get the gun?

A So he could pull one.

Q He wanted you to go get him a gun?

A Yes, sir, he did.

Q Did you know Robert was a doper?

A Yes, sir.

Q Didn't he have some dope with him when y'all went to Dallas?

A Yes, sir.

Q And when y'all were arrested, didn't he have some dope? [2392] A He had two pills left, yes, sir.

Q Had he been shooting dope that day?

A He shot some at his house before we left. Yes, sir.

Q Delma, you know, don't you, that association with these kind of people always leads to trouble, doesn't it?

A Yes, sir.

Q Have you learned your lesson, Delma?

A I sure have.

Q You look at that jury, Delma, and you tell them that if they will not impose the death penalty, you tell them what you're going to do with the rest of your life.

A Stay away from bad company, really. Be by myself.

Q You need a drink of water? Delma, weren't you raised in a good family?

A Yes, sir, I was.

Q Your mother and daddy are good people?

A Real good.

Q They take you to church?

A Yes, sir.

Q You promise this jury, Delma, that you will do something constructive with what is left of your life?

A I will.

Q I'll pass the witness.

CROSS EXAMINATION

BY MR. RAFFAELLI:

Q: Please the Court, Delma, you were here when Vetrano Jefferson testified, were you not?

A: Yes, sir.

Q: You saw that scar on the left-hand cheek of his, approximately right here (indicating), did you not?

A: Yes, sir.

Q: Did you inflict that scar upon him in April of this year?
A: I believe I did.
Q: How did you do that?
A: I hit him with a gun.
Q: Did you threaten to kill him at that time?
A: Yes.
Q: And you're telling me the latter part of April that you went back to Dallas, did you not?
A: The dates, I don't know, but I did go back to Dallas.
Q: You went back to Dallas.
A: Yes, sir.
Q: And at that time you went with the purpose to get your gun. Is that correct?
A: No, sir.
Q: Did you get your gun when you went to Dallas?
A: No, sir, I didn't get my gun. I got one gun, his gun. Two-two's gun.
[2395] Q: Two-two's gun?
A: Mine wasn't there.
Q: What kind of gun did you have?
A: I had a .22.
Q: Did you have a .25 automatic?
A: No, sir.
Q: Okay. You went to get your gun, but you didn't get it. Is that correct?
A: I didn't go to get my gun.
Q: You just went to get a gun?
A: Yes, sir.
Q: And the purpose, as you stated, that you went to get a gun, so you and Robert Farr could do some robberies, some armed robberies. Is that correct?
A: No, sir.
Q: What did you go get the gun for?
A: For him to do one.
Q: You were going to let him do them. You weren't going to do any with him?

A: No, sir.
Q: You were going to supply him your gun so he could do armed robberies?
A: No, not supply him my gun. A gun.
Q: In other words you didn't care if it was yours or whose, but you were going to be the man who got the [2396] gun to do armed robberies. Is that correct?
A: He was going to do it.
Q: I understand, but you were going to supply him the means and possible death weapon in an armed robbery case. Is that correct?
A: Yes.
Q: No further questions.

MR. COOKSEY: That's all I have.

THE COURT: You may step down.

MR. COOKSEY: Mrs. Banks.

MRS. DELMA BANKS, SR.

a witness called on behalf of the Defendant, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. COOKSEY:

Q: State your name, please.

[2397] A: Alleen Banks.
Q: Mrs. Banks, you are married to Delma Banks, Sr.?
A: Right.
Q: And you and Mr. Banks have six children?
A: Right.
Q: Delma Banks, Jr., is your oldest son, isn't he?
A: Right.
Q: Do you work outside the home, Mrs. Banks?
A: Yes, sir.

Q: And where are you employed?
A: Red River.
Q: Are you under medication?
A: No, sir.
Q: Okay. You work at Red River?
A: Yes, sir.
Q: And how long have you worked at Red River, Mrs. Banks?
A: Fifteen years.
Q: And, Mrs. Banks, you understand this jury has found your son guilty of capital murder, don't you?
A: I understand they have.
Q: You understand that there are only two punishments that can result from this, don't you? [2398]
A: I understand that.
Q: One life, and one death.
A: What will it profit them to kill an innocent person and let the guilty one go free?
Q: Mrs. Banks, are you asking this jury to spare your son's life?
A: I'm asking them to spare my son's life. They got any heart at all. I don't condone nothing wrong. I tried to raise my children up; my son is a good boy and he didn't do this. You don't have enough evidence to prove it, and so what are you gaining?
Q: Mrs. Banks, that's not . . .
A: Can you rest at night, knowing what you're doing?

THE COURT: Mrs. Banks, you are to answer only the questions that the attorney asks you.

A: I'm sorry, Your Honor.

THE COURT: All right.

Q: How long have you and Mr. Banks been married?
A: Twenty-four years.
Q: And how old is your youngest child?
A: Seven.

Q: Mrs. Banks, the issue before this jury now is the sentence to be imposed. You understand that?
[2399] A: Yes, sir, I understand.
Q: Do you think that up until this time Delma, Jr. has not caused any problems, has he?
A: Ye has not. He's a good boy.
Q: Mrs. Banks, he went to school and he worked, didn't he?
A: Right.
Q: And do you think that if Delma is allowed to live, that someday he will be a good member of our community?
A: I know he will; no doubt about it.
Q: Thank you, Mrs. Banks.
A: Give him a chance, please.
Q: Thank you. Pass the witness.

MR. RAFFAELLI: No questions.

THE COURT: You may step down; thank you, ma'am.

A: God bless each of you all. I love you . . .

THE COURT: Thank you, ma'am.

A: . . . and God loves you.

MR. ELLIOTT: Your Honor . . .

THE COURT: I'm going to ask you, Mrs. Banks, not to make any statement except in reply to the questions asked you.

A: I'm sorry, Your Honor.

[2401] * * * *

MR. RAFFAELLI: Ladies and gentlemen of the jury, first of all I want to thank you for your verdict. I think your verdict of capital murder was the only true verdict that could have been handed down in this case, and it was the only proper verdict. It has been a long time for some of you, but this trial is not over and this will be your last opportunity to deliberate

before this trial is completed. I'll be truthful with you. A minute ago, possibly yesterday, I noticed sympathy for the mother, father, the family—for both parents, and I can understand that. But the Court's charge instructs you that you shall answer these questions solely and strictly from the evidence that you have heard during the course of this trial. I want to briefly touch with you the evidence that you heard during the second phase. I want to assure you and remind you that you can consider all the entire evidence that you have heard throughout the entire trial, and not just the second phase. We saw Vetrano Jefferson, and he comes in and says on April 7th, he received a scar that I think all of you could see from where you were sitting, on his left cheekbone. He received that scar at the hands of Delma Banks from a pistol-whipping. He further states that when he left the house, that Delma Banks threatened to kill him, and that his sister had to come in and [2402] break it up. Delma Banks admits that, unquestionably. We heard from Robert Farr, and you have seen him testify throughout this trial. He has admitted to you that he used dope, that he shot. You know, he has been open and honest with you in every way, but he has shown proof and the proof has been corroberated by Delma Banks, is that they went to Dallas and the proof showed you that they got a gun, a .22 caliber pistol, from Charles Cook; and you hear Robert Farr say, as we drove away, he said, "Load the pistol." Said, "We're going to do some armed robberies on the way back to Texarkana," and he said, you know, what happened. They have only got one pistol and there's three of them. They have got one pistol, and I would be concerned if I was in an armed robbery and I didn't have a weapon, and he said, "Man, you know, what is there's trouble?" And he says, "Don't worry about it. I'll take care of it." I think that speaks for itself, and I think you know what that means. We're all reasonable people. Unquestionably.

You have heard Delma Banks admit going to Dallas, Texas, to get a gun. You have heard testimony that that was his gun. He came back to the car and stated in front of Marcus Jefferson and Robert Farr, that, "They didn't have my gun, but they gave me this gun." Why would somebody go to get somebody's gun to do murder, or to do robbery? Doesn't make sense, and I think you realize that.

Now we have heard from several witnesses on reputation, [2403] and they have all said Delma Banks has a good family, fine parents, but his parents are not on trial. His parents didn't do anything wrong. His parents didn't leave that young man, that sixteen year old boy, laying out on the ground, dead. Delma Banks did, and that's who we're here to try, today.

We have heard from James Kelley. He is a friend of the family. He adds nothing; he wasn't there; he doesn't know the circumstances. Delma Banks says no one wants to die. Well, I submit to you that Richard Wayne Whitehead was a sixteen year old boy in the prime of life, that was left laying on the ground in a park at Nash, Texas, dead. He didn't want to die. He had done nothing wrong.

Delma Banks says, "I'll stay away from bad company." Richard Wayne Whitehead was not bad company. He was a young boy in the prime of life, helped somebody out. Helped somebody that he used to work with, to give them a lift home. He wasn't bad company.

Delma Banks says yes, I whipped Robert Farr, and I whipped him with a gun, and I threatened to kill him. He says yes, we went to Dallas, Texas, and we went there to get a pistol. He says, "I thought I would give it to them so they could do the robberies." I don't believe you believe that.

Now the Court Charge talks to you about two questions or three questions. I believe when you took an oath [2404] you said you would render a verdict according to the law and the

evidence, a true verdict, so help you God. You did that yesterday, and I believe you would do it again today. I think we told you in Voir Dire that a jury in the state of Texas does not assess punishment. You will answer questions, and you answer those questions from the law and the evidence you have heard.

If you will recall, I asked you would you listen to the facts and let the facts dictate to you what the answers to the questions should be, and let the chips fall where they may. Each of you said you would, and I believe you will. I further asked you and if the proper answer is yes, will you answer yes, knowing that the defendant would get the death penalty. Each of you answered yes. I believe you will. There is no question in my mind these questions deserve to be answered yes.

In order that we might go over them briefly, let's just touch on them. Question number one says do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Delma Banks, Jr., that caused the death of Richard Wayne Whitehead, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. I think the answer to that is yes when you returned a verdict of guilty of capital murder. If there is a question in your mind was it deliberate, look at the shot [2405] between the eyes, on the bridge of the nose. You have heard the experts say twelve, eighteen inches, whatever their testimony was, no more than two foot, closer to eighteen inches. Gunpowder wounds. Unquestionably deliberate. Intentional. I think the answer to that question should be yes. I think it has been answered yes already. Question three, and I'll skip question two for the present time, says do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Delma Banks, Jr., that caused the death of Richard Wayne Whitehead, was committed deliberately or with the reasonable expectation that the death of the deceased

or another would result. I think that you have answered that question yes.

* * * *

MR. RAFFAELLI: Ladies and gentlemen of the jury, as I was stating, question number three, and I will read it to you, says, "Do you find from the evidence beyond a reasonable doubt that if raised by the evidence, the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?" I submit to you that the answer to that question is yes. There was no evidence—none—on provocation. The answer to question number three should be yes. As I have previously stated, question number one, I think when you [2412] returned your verdict of capital murder, and that's the only true verdict I think could have been returned in this case according to the law and the evidence, and that is that the act was committed deliberately. That question, I think, you have already answered in your mind, and that should be yes, also. Question number two states, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Delma Banks, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?" I submit to you the answer to that question is yes.

Take the testimony of Robert Farr. They went to Dallas to get the pistol. Delma Banks' pistol. Do harm? Robbery? Delma Banks said he was going to get the pistol to do armed robbery. I think you realize that a man doesn't travel two hundred miles, or whatever the distance is from here to Dallas, Texas, to supply a person with a weapon. Why? I think you know that Delma Banks went to get his gun. That gun has been identified as his. You have heard two family members state that when he returned he said something to the effect—and I'm not trying to quite the evidence. You heard that from the witness stand, but something to the effect that, "I didn't get my gun, but I got another one. Somebody had

my gun." And you heard Robert Farr tell him, as he drove away, to load it, and that, "I'll take care of it." I submit [2413] to you beyond a reasonable doubt that the State has again met its burden of proof, and that the answer to question number two should also be yes.

As I previously told you, according to the Court's charge, you shall answer these questions solely and strictly from the evidence that you have heard during the course of the trial, solely and strictly from evidence. All the evidence that you have heard during both phases of the trial, both guilt and innocence phase and the punishment phase. You, each of you, told me that you would listen to the facts, and that you would let the facts dictate to you what the answers to the questions should be. I submit to you that if you listen to the facts and judge this case from the law as has been given to you by the Court and the facts that you had received, that you will answer each question yes. Thank you.

THE COURT: Mr. Cooksey?

MR. COOKSEY: Ladies and gentlemen of the jury, it has been really a long week, now. Ladies and gentlemen, we accept your verdict. I may have made some tactical errors throughout the trial. I may have offended somebody. If I made any errors, I apologize to you; and if I have offended you, I likewise apologize. Ladies and gentlemen, for a lawyer to stand before twelve fellow citizens of Bowie County and plead for a man's life is an awsome responsibility. I am pleading for Delma's life. I submit to [2414] you that on the evidence, Delma did a terrible thing. I submit to you he is not but twenty-one years old. I think probably you noticed when Delma got on the stand, he could have lied about some things, but he didn't. Delma's statements to you from that witness stand have been his statements to me from the first day I represented him.

Ladies and gentlemen, as all of you know, all "yes" answers will result in a death penalty. Any "no" answer will result in a mandatory life sentence. The State has the burden of proof on all of these questions. You were qualified as jurors on Doctor James Grigson, the psychiatrist in Dallas. The State did not produce Doctor Grigson to meet their burden of further acts of future criminal violence. The testimony they have that would involve Delma in any future acts of violence is the statement of Robert Farr.

Ladies and gentlemen, I plead with you, please examine Robert Farr's testimony. Please examine what Mr. Owen says about Robert Farr, whom he has known for seven or eight years. Please don't sentence Delma to death because of the sorry company he kept. Granted, these people were no good. Granted, Delma should not have been in their company. Please distinguish between the acts of these other people with their long past criminal record, and Delma. Doctor Grigson is not here, and Doctor Grigson did not testify for you. You're a lot of good folks. Delma was always a good and [2415] respectful kid. One of his school teachers comes and tells you that he was not a disruptive factor in his school. Delma has a good basis in life. He comes from a very fine family. As you have seen throughout this trial, scores of his friends up here. Please don't do this to Delma. Punish him severely: life sentence. My goodness, that's severe punishment, but please, let's not take his life. Thank you.

THE COURT: Mr. Elliott?

MR. ELLIOTT: May it please the Court.

THE COURT: Mr. Elliott.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: Ladies and gentlemen of the jury, if you would, please, take a moment. I have but ten minutes before

you. Please use part of that time to draw a deep breath, collect yourself, compose your thoughts, and try to put into perspective what our purpose is here. In fact, what the purpose of all criminal law is. It is to suppress crime, prevent crime, and punish crime. It is, quite simply, to prevent harm to us all. That's what this phase of the hearing is about. That, and nothing else. It is your part in our system to help protect our nation and our society. Your oath that you would a true verdict render according to the law and evidence applies to your duty as a [2416] fact-finding body. You sentence no one to death. You will not write "death" on a piece of paper, and you will not say "death." You will find the answers to questions based upon evidence, and that's what your purpose is here. That, and that alone.

I will not go through the questions. You will have them in the charge. I would simply say to you that based upon the evidence that you have seen presented here in court, the only reasonable and the only possible answer to those questions that could be in accordance with reason and good judgment is "yes." The only reasonable answer to those questions is "yes."

The testimony of Vetrano Jefferson and Robert Farr is of the utmost significance. Vetrano brought before you the scar on his face, put there by Delma Banks. Vetrano is part of Delma's family. He was pistol-whipped. He was threatened with a pistol. He also corroberates or supports the testimony of Robert Farr. You don't have to believe just Robert in order to find that Delma went to Dallas to get a pistol so that somebody could do some robberies. Marcus Jefferson told you that, too. Marcus Jefferson told you that, too. I think it is worth noting, Marcus is family. Richard Whitehead was a stranger. Delma is a danger to friends and strangers, alike. It doesn't make any difference whether he knows you or not. With regard to the robberies that were [2417] going to be committed coming back to Texarkana, we'll take care of

them. And what if there is any difficulty? We'll take care of them.

I listened very closely to Mr. Cooksey's defense argument. Throughout it I was haunted by an idea that was present in this courtroom, and it is simply this. Evil people do exist. Delma Banks is evil. You don't blow somebody away like Richard Wayne Whitehead, and then execute them, if you're a good boy, you come from a fine family, you've been to church. What accounts for the ability to slaughter a human being like that, except for the quality of evil? And let me tell you something. We're not protected. Our laws give us the opportunity to protect ourselves, but no helping hand comes down from heaven. All that is necessary for evil to triumph in this world is for good people to do nothing, and we lose.

Mr. Cooksey refers to the absence of Doctor Grigson. You don't need a psychiatrist to tell you that with regard to question number two, the answer should be yes. With regard to criminal acts of violence that would constitute a continuing threat to society, you don't need a doctor to come into this place and to tell you the pistol-whipping, the threatening with a pistol of Vetrano Jefferson, the murder of Richard Wayne Whitehead, and then the planning and acquisition of a gun to commit robbery, you don't need anybody to tell [2418] you that there is a probability that this will continue. You have violence before the fact, you have violence during the fact, and you have planned violence after the fact. That question has only one answer, and it is yes.

With regard to the people we saw here, Mr. and Mrs. Banks, the father and the mother, the mother says there is not enough evidence, and the father says he was in a little trouble and he ran with the wrong bunch. And ladies and gentlemen, we wouldn't quarrel with these people. There is just one comment that can be made about these people, and that is the quality of love that parents have for a son is not strained, even though that son may be one Delma Banks.

THE COURT: You have four minutes.

MR. ELLIOTT: Thank you, Your Honor. The Reverend Ford, Reverend Gallutte, Reverend Lewis, men of God, men who testified Delma was good. But you know what? They don't know the other side of Delma the way you know Delma. They didn't see the other half of his soul, the way you saw it revealed in this courtroom. Mr. McGill, the teacher, he never gave me any trouble, but he didn't know Delma, either, did he? He didn't know Delma after school was out and I would submit to you that in that lonesome Godforsaken place in Nash, Texas, in the early morning hours of April 12th, school was out. School was out, and life ended for Richard Wayne Whitehead for the hell of it.

[2419] That's why that boy died. That's why his parents suffered. That's why you're here: for the hell of it.

James Kelley knows nothing about the murder, knows nothing about Delma Banks' whereabouts or actions on that night. Gary Owen, wishing to please his future employers, absolutely no significance whatsoever to what the man said. He heard, he believes, he thinks, but he doesn't know.

Sylvester Hill does not know. And last, I ask you to consider the evidence of Delma Banks. Not one tear until he started talking about his own life. Nobody asked Richard if he wanted to die. Nobody asked the question. I want to live. So do the rest of us, ladies and gentlemen.

As you sit here, this is probably the most terrible position you will ever find yourself in, in your life, because you possess a Godlike power. You will say life, or by your answers you will so indicate that the Judge must say death, but you're not God. You're a jury, and this is not an unholy function. We live in two worlds. Render unto Caesar what is Caesar's and unto God what is His. Christ spoke those words in answer to the question do we pay taxes to pagan temples, and then Christ said render unto Caesar—He recognized that

there was a law of this earth that must guide our actions. And when He said render unto God, He recognized that there is a spiritual world, too; and the two, even though they may be in conflict, must exist together. That is the [2420] problem of life. This is not a question of revenge. This is not a question of vengence. You can not forgive Delma Banks. It is not within your power to forgive Delma Banks.

THE COURT: Your time is up.

MR. ELLIOTT: Thank you, Your Honor. The stain is on his soul forever.

MR. COOKSEY: Your Honor, I would object . . .

MR. ELLIOTT: . . . and all we would ask . . .

MR. COOKSEY: . . . to counsel continuing after you say his time is up.

MR. ELLIOTT: All we would ask is what we sought from the beginning. Simple justice. Thank you.

THE COURT: The objection is overruled. Ladies and gentlemen, at this time you will go with the bailiff and you will take the charge on punishment, and you will commence your deliberations. But before you go, now I'm going to ask that the courtroom—I'm going to allow you to go back down there to the county courtroom. Is that where y' all would like to go back to deliberate? Keep your seats just a minute. You may discharge all of the witnesses down there and clear the courtroom down there, and let the Court know whenever it's clear.

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY, TEXAS AND IN THE
COURT OF CRIMINAL APPEALS,
AUSTIN, TEXAS

[Filed Jan 13, 1992]

No. 80F86

EX PARTE
DELMA BANKS, JR.

APPLICATION FOR POST-CONVICTION
WRIT OF HABEAS CORPUS

Mr. Banks is scheduled to be executed
WEDNESDAY, JANUARY 15, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, pursuant to Art. 1 Tex. Code Crim. Proc., and petitions this Court to issue a writ of habeas corpus, on the grounds that his restraint is founded on an unconstitutional judgment of conviction and sentence of death, entered in violation of the Constitution and laws of the State of Texas and the Constitution of the United States. In support of which, Mr. Banks states as follows:

I. PRIOR PROCEEDINGS

Delma Banks, Jr., a thirty-three year old African-American man, is an indigent prisoner on Death Row in Huntsville, Texas. The state official responsible for confining Mr. Banks

and putting him to death is James A. Collins, Director of the Texas Dept. of Criminal Justice, Institutional Division.

Mr. Banks was convicted of capital murder in the 102nd District Court of Bowie County, Texas, on September 30, 1980, and was assessed the death penalty on October 1 Exhibit A. His conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1983). The Supreme Court denied *certiorari*. *Banks v. Texas*, 464 U.S. 904 (1983). Mr. Banks' initial application for postconviction relief under Tex. Code Crim. Proc. Art. 11.07 was denied in an unpublished order dated February 29, 1984. *See Ex Parte Banks*, 769 S.W.2d.539, 540. (Tex. Crim. App. 1989). His second application for postconviction relief was denied in a published opinion after rehearing. *Ex Parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). By order of December 10, 1991, the trial court set Mr. Banks' execution for January 15, 1992. This action followed.

II. CLAIMS FOR RELIEF

THE STATE FAILED TO REVEAL SECRET AGREEMENTS WITH ITS KEY WITNESS.

1. The case against Delma Banks, Jr., turned on the pivotal testimony of one witness: prosecution witness Charles "Two-Two" Cook. The direct appeal opinion of the Court of Criminal Appeals compels this conclusion; rejecting a claim that the State's evidence was insufficient to prove Mr. Banks' guilt beyond a reasonable doubt, the Court toted up the inculpatory facts:

> We conclude that the evidence is sufficient to establish that the appellant intentionally caused the death of Whitehead while in the course of committing robbery. In addition to appellant's admission that he killed Whitehead and stole his vehicle the evidence shows that the appellant was the last person seen with the deceased when he was alive. The appellant was seen in the

deceased's automobile in Dallas the following day. The murder weapon belonged to the appellant. The evidence is sufficient to support the jury's verdict.

Banks v. State, 643 S.W.2d 129, 132 (Tex. Crim. App. 1983) (citations omitted). Almost all this evidence—Mr. Banks' alleged extrajudicial "confession," his alleged ownership of the .25 caliber pistol recovered through Cook, and his alleged presence in Dallas, driving Whitehead's car—came before the jury through the testimony of one witness: Charles Cook.

2. What the jury did not know was that Cook was testifying pursuant to a generous "deal" cut with the prosecutors—a deal that would erase charges already pending against Cook, and which would prevent further charges, based on Cook's own involvement in the events surrounding the Whitehead murder, from being pressed. The prosecutors' determined concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). Because the State's refusal to reveal its agreements with Cook deprived Mr. Banks of a fundamentally fair trial, this Court must reverse his conviction and sentence.

3. The "deal" Cook made with the State had two parts. First, in return for his testifying against Mr. Banks in a manner favorable to the prosecution, the prosecution agreed not to charge Cook as an accessory to the Whitehead murder. Exhibit D, Affidavit of Patrick DeLaune re Charles Cook. Given that he had acknowledged being in possession of both the murder weapon (over which he had exercised apparent ownership, selling it to a neighbor) and the victim's automobile, the threat from such a charge was real and immediate. In addition, Cook's lengthy prior criminal record made likely that the prosecution would seek to enhance his punishment under Texas' habitual offender statute; as a

result, Cook faced a possible long prison term if he did not testify.

4. Second, in return for Cook's testimony against Mr. Banks, the prosecutors engineered the dismissal of a serious pending charge against him. Cook, at the time a parolee from the Texas prison system, had been charged with arson. Despite the fact that Cook's sister, the victim of the alleged arson, had stated under oath that she did not intend to pursue the charge against Cook, State authorities refused to release him. Exhibit E, Dallas Court Records of Charles Cook. Indeed, far from relenting, the prosecutors turned up the heat by enhancing the charges to allege that Cook was a habitual offender—exposing him to a possible sentence of life imprisonment. *Id.* Fortunately for Cook, his bravura performance in Texarkana accomplished what his sister's pleas could not; only days after he testified against Mr. Banks in Bowie County, the charges against him in Dallas were dismissed and he walked out of the Dallas County jail a free man. Such a happy coincidence compels the conclusion that the prosecution bargained for Cook's testimony, pledging to dismiss the pending charges against him in return for his cooperation.

5. The prosecution's failure to disclose that Cook stood to profit so enormously by his testimony, narrowly evading a possible life term in prison, requires the reversal of Mr. Banks' conviction and sentence of death. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Such critical evidence concerning the credibility of a government witness is exculpatory, and must be disclosed. *Giglio, supra.* This impeachment evidence is "favorable to an accused," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and must be delivered to the defense upon request because "(t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible

interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

6. It cannot be disputed that the testimony of Charles "Two-Two" Cook was the focus of the State's case at the guilt phase of Mr. Banks' trial, as is evident from the amount of time devoted to it in the closing arguments of both sides. *See* S.F. Vol. VIII at 2272-2276, 2281-2291, 2294, 2297-3000. Likewise, Cook's credibility was as critically important as the content of his testimony; if the jury believed him, they would probably convict Mr. Banks. Further, if they convicted Mr. Banks, they would probably return an affirmative answer to the second special issue, because of Cook's damning allegation that Mr. Banks bragged of having killed Whitehead "for the hell of it." As a result, the prosecutors' actions in concealing from the jury Cook's enormous incentive to testify in a manner favorable to the State require that this Court reverse Mr. Banks' conviction and sentence.

* * * *

COUNSEL FAILED TO PROVIDE MR. BANKS EFFECTIVE ASSISTANCE THROUGHOUT ALL STAGES OF THE PRE-TRIAL, VOIR DIRE, AND TRIAL PROCEEDINGS.

15. By any standard, counsel for Delma Banks, Jr. fell below the expected range of conduct for minimally competent attorneys. As a result of counsel's manifold errors and omissions, Mr. Banks was convicted of capital murder and sentenced to death, and now faces execution.

16. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel, a right fundamental to our criminal justice system. Our adversarial system presumes that counsel will act as advocate for the accused. *Anders v. California*, 386 U.S. 738 (1967). To that end, the Supreme Court has repeatedly

emphasized the "fundamental" role of counsel to a fair trial. *See, e.g., United States v. Cronic*, 466 U.S. 648 (1984); *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Counsel is the means through which the defendant's rights are secured. *Cronic*, 466 U.S. at 653; *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). Without competent counsel, the trial loses its character as a fairly matched battle between adversaries; truth is the first casualty. *Cronic, supra.*

17. In *Strickland v. Washington*, 466 U.S. 688 (1984), the Supreme Court held that counsel was constitutionally ineffective if his conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. *Id.* at 685. The inquiry is twofold: whether counsel's performance was in fact deficient; and, if so, whether the defendant was prejudiced as a result. *Id.* at 668.

18. To make the first determination, the proper inquiry is whether counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 694. To satisfy the prejudice requirement, the proper inquiry is whether there exists a reasonable probability that, were it not for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

19. The failings and errors of counsel in this case were extraordinary. By any legal standard, the performance of Mr. Banks' counsel fell far below the minimum standards expected of reasonably competent attorneys, and Mr. Banks was actually prejudiced as a result. Certainly, given the hapless efforts to defend Mr. Banks at the sentencing phase of the trial, the totality of the representation of the accused warrants a new trial. Furthermore, had adequate representation been provided, Mr. Banks would not have been convicted of

capital murder and he certainly would not have been sentenced to death.[2]

20. Many of the grounds for relief set forth in this petition were not objected to at trial or raised on appeal. To the extent this Court finds that counsel's failure to object at trial to any of these errors or raise these issues on appeal is a procedural bar, petitioner submits that counsel was constitutionally ineffective for failing to preserve these issues. Furthermore, trial counsel was also ineffective in affirmative respects discussed in detail below.

21. It is important to note in reviewing these claims that defense counsel, Lynn Cooksey, was not an inexperienced trial lawyer. He had been employed by the Bowie County District Attorney's office for ten years, from 1969 through 1978. He was the duly elected district attorney for the last eight of those years. After Cooksey left that office, he defended several clients in criminal cases before taking on Mr. Banks' case in the spring of 1980. (Exhibits H, I). By all accounts, including his own, Mr. Cooksey was a seasoned, highly successful criminal lawyer.[3] Delma Banks, Sr., and his wife Ellean sought Cooksey out to defend their son's life because they had been told he was the best defense lawyer in Texarkana. (Affidavit of Delma Banks, Sr., Exhibit C).

22. Mr. and Mrs. Banks did not have the means to pay in advance the entire $10,000 fee demanded by Mr. Cooksey, but they managed to scrape together $1,000 as a down

[2] Indeed, counsel's failings and errors in this case were sufficiently egregious to constitute a complete breakdown in the integrity of the adversarial process. *United States v. Cronic*, 466 U.S. 648 (1984). For this additional reason, no showing of prejudice is required.

[3] In 1978, Mr. Cooksey claimed in an interview with *Time* magazine that he had a record of 3,500 criminal convictions and only five acquittals in nine years as a district attorney. He bragged, "I've got the best prosecution record in the state of Texas." "Keystone Kops," *Time*, March 27, 1978, at 84. (A copy of the article is attached as Exhibit J.)

payment. They also had to come up with another $1,500 at the insistence of Mr. Cooksey, to hire Dennis waters, a private investigator with whom Mr. Cooksey often worked, to assist in the defense. Making these payments exhausted the Banks' financial resources, but gave Mr. Cooksey vital resources of money and investigative aid to use in preparing his defense of Delma Banks, Jr. (Exhibit C). Unfortunately, those resources were squandered.

A. Counsel failed to investigate matters relevant to both guilt/innocence and punishment phases of the trial.

23. Though he was retained soon after Delma Banks, Jr. was arrested, Mr. Cooksey failed to use the months before trial to do some basic investigation. At trial he argued strenuously against the admission of pictures of the park where the deceased was found, saying he was surprised because he had never seen the pictures and could not effectively cross-examine the witness about them. One of the reasons he was surprised was that he had never visited the park and did not know what the area looked like. (S.F. Vol. VIII 2003-4). The park was hardly in some remote province; it lay less than five miles from Cooksey's own desk.

24. There is also nothing in the record to indicate that Mr. Cooksey or Mr. Waters checked into the autopsy report's finding that the date and time of death were April 14, 1980 at 10:15 a.m., more than *two days* after the State's proposed time of death. (Autopsy report, Exhibit R). Though that precise time may have been the time at which the body of Mr. Whitehead was discovered, the time at which the autopsy was performed, or even the time at which the report was dictated, the medical examiner did not testify as to a date or time of death. Indeed, the condition of Mr. Whitehead's body at the time of the autopsy was such that death could easily have occurred as recently as 24 hours before the body was found. The only evidence the State presented regarding the time of death was the testimony of Mike Fisher that he heard two

sounds that sounded like gunshots at 4:00 a.m. on April 12, 1980 and that he was at a house near the park where the deceased was ultimately found when he heard those sounds. (S.F. Vol. VIII 1988-91). He did not say whether they came from the park or how close they sounded to his location. He did not say whether they sounded like pistol or rifle shots.

25. The State's thin veneer of "proof" of the time of death was allowed to stand because Mr. Cooksey cross-examined neither the medical examiner nor Mr. Fisher in any way that would break through to the emptiness of the State's evidence. Mr. Cooksey also did not argue in closing at the guilt/innocence stage that there should be any doubt as to the time of death. There could have been no reasonable tactical or strategic reason for failing to investigate, explore through cross-examination, or highlight in closing argument the disparity in the date of death and the allegations of the State. If Mr. Whitehead suffered his wounds anytime after 6:00 a.m. on April 12, 1980 in Texarkana, Delma Banks could not have been the person who shot him, if Charles Cook's testimony that he first saw Mr. Banks in Dallas at 8:00 a.m. on April 12, 1980 is to be believed. (S.F. Vol. VIII 2117).

26. Neither Mr. Cooksey nor Mr. Waters did anything to investigate the mental condition of their client. They did not arrange for his evaluation by a mental health professional, despite the fact that Mr. Cooksey had to slowly and carefully, and often repeatedly, explain various preliminary stages of the court proceedings to Mr. Banks. This lack of understanding on the part of Mr. Banks continued to manifest itself throughout the trial in his conversations with his lawyer and the Court. Had Mr. Cooksey made a reasonable effort to discover the reason for this, he would have found that Mr. Banks suffered from a number of problems which could have had a tremendous impact on issues at both stages of the trial.

27. A recent psychological evaluation of Mr. Banks revealed a full scale IQ of 85, which is his "best functioning"

range. Stressful conditions deteriorate his ability to intellectually deal to a given situation, especially when the situation mainly involves listening and responding verbally. He suffers from gross deficiencies in long term memory and a diffuse neurological disorder. He also has considerable trouble in spelling, reading and comprehending what he is reading. The evaluation found Mr. Banks severely impaired in long-term verbal memory and noted a significantly diminished capacity to communicate verbally and understand what is being said to him verbally. These problems are associated with brain damage. (Affidavit of Patrick DeLaune re Gregorio Pina, III, PH.D, Exhibit K).

28. Because of these organic, permanent neurological problems, Mr. Banks has had to follow the lead of others to function in the world. He masks his deficits by nods, smiles, and saying things that indicate agreement with whoever is speaking to him. These actions on his part lead others to believe that he is comprehending what is happening in a given situation when that is not really true. This compensation for his brain damage is a common adaptation by people with problems similar to those of Mr. Banks. (Exhibit K).

29. The trial and the proceedings leading to it presented Mr. Banks with an enormously stressful situation, which would have decreased his ordinarily low intellectual functioning. At those proceedings, it is likely that Mr. Banks resorted to a pattern he had long used to survive in the world: compliance with authority. To determine what people in authority, such as his lawyer, or the judge, wanted, he likely used visual cues, such as facial expressions and even verbal intonations, as a primary basis for many of his decisions and responses to trial situations. Mr. Banks' personality, compounded by his organic brain damage, render his comprehension of the stressful trial situation highly questionable. Specifically, his dysfunctions and personality likely combined to prevent him from understanding many of the

questions asked of him by Mr. Cooksey and the Court. Mr. Banks would not say as much, however, because of his difficulty in communicating verbally and because of his long pattern of masking his disabilities by going along with what he thinks people want to hear.

30. Obviously, Mr. Banks brain damage and low mental functioning are impediments to effective communication with legal counsel. He is easily confused when talking and trying to understand speech. There is some indication in the trial record that Mr. Cooksey and the Court were aware of some communication problems. At least twice, meetings took place in the Court's chambers with Judge Pesek, Delma Jr., and Mr. Cooksey present. (S.F. Vol. IX 2241-58; 2357-68). At each of those conferences trial counsel and the Court attempted to explain decisions that they wanted Delma Banks to make in the legal arena. He exhibited considerable confusion during those meetings, and always acquiesced in what his lawyer or the Court wanted, when he picked up on indications of specific advice.

31. The record plainly demonstrates Mr. Banks' confusion and misunderstanding. At the second conference, which took place during the punishment phase of trial, Delma told Mr. Cooksey and the trial court that he still did not understand how he could have been convicted when no one had found anything in his possession. (S.F. Vol. IX 2368). Despite his lawyer's explanation, when Delma testified, he again said that he did not understand that the jury had found him guilty. (S.F. Vol. IX 2389).

32. It is evident from their unusual treatment of Delma during the chambers conferences that both Mr. Cooksey and Judge Pesek knew or strongly suspected that Delma suffered from serious mental impairments. That should have raised in Mr. Cooksey's mind a host of issues, such as the possibility that his client might not be competent to stand trial and might have severe problems in understanding legal proceedings and

decisions that might be required of him. Additionally, problems understanding speech and speaking carry obviously significant connotations regarding his alleged admission to Charles Cook and his reaction to questions put to him by various people about the crime. Indeed, his dysfunctions undoubtedly played a part in whatever the situation was that he found himself in on the evening of April 11 and the early morning hours of April 12, 1980.

33. Despite all of this, trial counsel did not ask for an evaluation of his client by any mental health professionals, nor did he seek expert assistance in understanding or describing his client's limitations to the jury. Expert witnesses are critical in many capital cases. Without their assistance, the sentencing jury may be deprived of a mitigating explanation for otherwise unexplainable behavior. Thus in *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988), the court found trial counsel ineffective for failing to investigate a capital defendant's mental condition for the purpose of presenting mitigating evidence in the sentencing phase. Because counsel presented no evidence in mitigation of punishment, despite the fact that a reasonable investigation would have uncovered substantial mitigating mental state evidence, the court granted the petitioner a new sentencing trial. *Id.* at 637; *see also Middleton v. Dugger* 849 F.2d 491 (11th Cir. 1988) (failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case was ineffective assistance of counsel). Similarly, in *Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988), the Georgia Supreme Court held that trial counsel's failure to obtain an independent psychiatric evaluation in a capital case violated the defendant's right to the effective assistance of counsel. *See also Stephens v. Kemp*, 846 F. 2d 642 (11th Cir. 1988) (counsel was ineffective for failing to investigate, present, and argue to the jury at the sentencing phase evidence of defendant's mental history and condition).

34. The only time trial counsel showed any interest in establishing anything about Mr. Banks' mental functioning was when he attempted to establish that his client had no mental disorders, was competent, and not insane. (S.F. Vol. IX 2251-52). The farcical quality of any suggestion that the halting, uncertain, eager-to-please Mr. Banks might somehow self-prove his competency, sanity, and freedom from mental disorders is obvious following Dr. Pina's examination-and should have been obvious to the participants at the time of trial. Defense counsel's and the trial court's findings that Delma was a "bright young man" notwithstanding, (S.F. Vol. IX 2251, 2253), it is inexcusable that Mr. Banks' mental functioning was never investigated by his lawyer.

35. Indeed, the fact that Delma Jr. was called to discuss strategy and tactics with his lawyer in the presence of the court shows an utter lack of respect for the confidentiality of the attorney-client relationship by officers of the court who should have known better. Mr. Banks' right to the effective assistance of counsel surely encompassed the right to private communication without the stressful and inhibiting presence of the trial judge.

36. Even when trial counsel did present evidence, he did not take the time to investigate his own witnesses and what they could say. Mr. Cooksey did nothing to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of the trial. During a meeting in chambers with Judge Pesek present, Mr. Cooksey admitted that he did not know the people he was calling and examining for the defendant. (S.F. Vol. IX at 2358-2359). He did not even prepare Mr. and Mrs. Banks to testify. (Exhibits B, C). Neither he nor Dennis waters questioned either parent about Delma Jr.'s childhood or health problems. Had they done so they would have discovered a wealth of information that would have cast a far different light on Mr. Banks than the State's grossly distorted picture of a remorseless killer.

37. Life was a struggle for Delma Banks, Jr. from the very beginning. Just a few days after he was born, he developed a bad rash that did not improve with treatment. One doctor after another examined, tested, and treated him. Finally they determined that the fragile baby was hyperallergenic, allergic to almost everything around him. (Affidavit of Ellean Banks, Exhibit B).

38. The doctors told Mrs. Banks that there were many foods that her frail son should not eat. She could not follow their advice because the family lacked money to buy food for the baby different from what the rest of the family ate and she felt it would have been nearly impossible to keep her son from eating what he wanted to eat. Exhibit B.

39. These allergies made Delma Jr.'s life miserable even when he came into indirect contact with things to which he was allergic. Mr. Banks worked at a chicken plant for some time, and Delma, Jr. got terrible rashes if his father even touched or played with him. It did not matter if Mr. Banks took a shower and changed clothes; the rash appeared anyway, an angry, unsightly barrier between father and son. Mr. Banks finally changed jobs to try to reestablish a relationship with his son. Exhibit B.

40. When Delma Jr. was a small child his allergies often made him break out in hives. When that happened, neither he nor his mother slept. She used to put socks on his hands and pin them to his diaper to try to keep him from scratching at his face and arms. Once after she had done that and later checked on him, she found that he had rubbed his face completely raw on the pillow by twisting and turning his head to try to scratch the rash on his face. As she comforted him and saw his bloody pillow, she wondered whether she was somehow to blame for his illness. *Id.*

41. At times the unrelenting allergies even threatened Delma Jr.'s life. When he was three or four years old, he

received a penicillin shot and his face swelled up like a balloon. He survived, but the doctor treating him told Mrs. Banks that if he ever had such a reaction again, it might kill him. *Id.*

42. It is not hard to imagine the devastating effect that Delma's allergies had on his social relations with others. When he was a child, he was always self-conscious about how his arms and legs looked because they were covered with sores caused by his allergies. Other children often teased him. He wanted badly to take part in sports, but did not because he was so ashamed of the sores on his arms and legs that he would not wear clothing such as uniforms that did not have long sleeves and long pants. He even wore long-sleeved shirts in the middle of summer so that people would not see his sores. Desperate for friends, he became a follower of others and often took the blame for things other people did. *Id.*

43. As traumatic as his allergies were, they were not the only burden Delma Jr. bore during his childhood. His father had a severe drinking problem which nearly tore the family apart. He would got drunk frequently, then yelled and screamed at his wife. Sometimes he hit her. Mrs. Banks and the children were terrified of him and she took the children to various places to run away from the situation. Mr. Banks always apologized and pledged to do better, the family would reunite, then the drunken episodes would happen again. *Id.*

44. Even when Mr. Banks tried to do right by his children, he could be harsh. Once when Delma Jr. was very young and in elementary school, the principal of his school told Mr. Banks that his son was doing something to trick other students out of their lunch money. Mr. Banks promptly tied Delma Jr. to a tree in the yard of their home and whipped him with a leather belt or strap. He told Delma Jr. that he was going to leave him tied to the tree all night, then slipped out of sight. A neighbor who saw what was happening let

Delma Jr. go. No other school problems with Delma Jr. were reported to Mr. Banks following that incident. Exhibit C.

45. While trial counsel's failure to investigate information relevant to the guilt stage of the trial is deplorable, his failure to adequately investigate and present mitigating evidence at the punishment is even more outrageous. Trial counsel in a capital sentencing proceeding must ensure the adversarial process works to produce a just result. *Strickland v. Washington*, 446 U.S. 668 (1984). One of an attorney's principal duties is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 668; *see also Darden v. Wainwright*, 478 U.S. 1036 (1986) (counsel not ineffective because he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989). In a capital case, the investigation, preparation, and presentation of mitigating evidence is in many cases a much more critical task than preparing for the guilt/innocence phase. Guilt is frequently a foregone conclusion.[4] Whether the accused lives or dies, however, is not.

46. As the Supreme Court has recognized, the sentencing body must have before it the fullest information possible concerning the defendant's life and background. *Lockett v.*

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[4] The conclusion is not foregone in this case, however. As will be argued throughout the course of this petition, Mr. Banks case was a flimsy construction of circumstantial "evidence" held together only by the oily paste of Charles Cook's testimony. There is no evidence directly linking Mr. Banks to the crime. The jury never knew, when it evaluated the credibility of Mr. Cook that he had been threatened with two life sentences if he did not testify and that he had to practice his testimony for three days in the courtroom when court was not in session before the State could be sure that he would get it right. (*See* Exhibit D). The jury also did not know at the guilt/innocence stage of the trial that Vetrano Jefferson had told James Kelley that Mr. Banks had not committed the murder. (S.F. Vol. IX at 2550).

Ohio, 438 U.S. 586 (1978); *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The logic to this Eighth Amendment principle is self-evident. In the capital sentencing proceeding, "the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" *Turner v. Murray*, 476 U.S. 28 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). It is essential, therefore, that the sentencer consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The failure to consider mitigating evidence creates the risk the death penalty will be imposed in spite of factors which may call for less severe penalty. *Id.; see also Skipper v. South Carolina*, 476 U.S. 1 (1986) (state's exclusion of evidence regarding adjustment to prison violated Eighth Amendment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of turbulent family history violated Eighth Amendment).

47. It is for this reason that courts have given special attention to capital cases where little or no mitigating evidence is presented in support of a life sentence. *See, e.g., Harris v. Dugger*, 874. F. 2d 756 (11th Cir. 1989); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988); *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987); *King v. Strickland*, 748 F.2d 1462 (11th Cir.), *cert. denied 471 U.S.* 1016 (1984); *Bolder v. Armontrout*, 713 F.Supp 1558 (W.D. Mo. 1989); *Mathis v. Zant*, 704 F. Supp. 1062 (N.D. Ga. 1989); *see also Cook v. Lynaugh*, 821 F.2d 1072 (5th Cir. 1987).

48. In this case, investigation for both stages of trial was woefully inadequate. Despite the availability of a substantial number of sources of mitigating evidence, those sources were used little or not at all. Pretrial investigation, principally

because it provides a basis on which most of the defense case must rest, is perhaps the most critical stage of a lawyer's preparation. *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984). By failing to adequately investigate Mr. Banks' case, Lynn Cooksey robbed himself of the opportunity to evaluate whether his defense at the guilt/innocence stage could be based upon a more substantial theory than failure of the State's proof (which, as any competent defense lawyer knows, is often no "theory" at all). He also robbed his client of the chance to be found not guilty by the jury.

49. Mr. Cooksey tried to make up for his lack of investigation of the guilt/innocence issues by proposing that Mrs. Banks testify that Delma, Jr. could not have committed the crime because he was home with her on the night of the murder. When she said she could not lie to the jury, he grabbed her shoulders and shook her hard, saying, "What kind of mother are you that you won't tell a little white lie to save your own son?" She continued to refuse and Mr. Cooksey, no doubt frustrated, dropped the idea. Exhibit B.

50. First stage matters aside, had the mitigation evidence set forth above been developed and presented, no humane sentencer would have returned a verdict of death. The tragedy that marked Delma Banks' life is outside the realm of normal experience, and had the jury known of it, its view of the state's evidence would without question have been totally different. *See Harris v. Dugger*, 874 F.2d 756, 763. (11th Cir. 1989). Certainly, evaluating the totality of the circumstances, as required under *Ex parte Walker, supra*, counsel's feeble attempt to present a defense at the sentencing phase entitles Mr. Banks to a new trial. The failures of trial counsel here deprived Mr. Banks of his right to effective assistance of counsel and may ultimately cost him his life. For these reasons, this court should issue the writ of habeas corpus on Mr. Banks' behalf and vacate his conviction and sentence of death.

B. Deficiencies In Trial Counsel's Performance in Pretrial Proceedings and Jury Selection.

51. Trial counsel filed few motions and filed most of them on August 15, 1980, close to the time of trial. (Tr. 16-32). Virtually none of those motions were taken up by the court until September 22, 1980, the same day that jury selection started. (Tr. 7). In a turn of events that would be comic if it were not so tragic, one of the motions decided at that time was a discovery motion (Tr. 24). Of course, with the beginning of the trial imminent, any information gained through the motion could not have been used meaningfully to develop or inform defense strategy. Trial counsel simply did not follow up on even his own motion for discovery to try to prepare for this case.

52. Despite considerable pretrial publicity, defense counsel did not request a change of venue motion until Mr. Banks himself pleaded not to be tried in Bowie County because he feared he could not receive a fair trial there. Delma Jr. made this plaintive request on September 22, 1980. The next day, with the bare minimum of support required by statute through affidavits, trial counsel filed the motion. (Tr. 65). A brief "hearing" was held on September 29, 1980, just before the start of the jury trial. (S.F. Vol. VIII at 1912-1932). At that "hearing," two witnesses testified for the State, one of whom was Willie Huff, the chief investigating officer on the case, hardly an unbiased witness. Mr. Cooksey asked very few questions of either witness and even asked Mr. Banks for advice on what questions he should ask. (S.F. Vol. VIII 1919, 1922). At the end of the State's evidence against the venue motion, Mr. Cooksey offered only the testimony of Mr. Banks. Mr. Banks was obviously unprepared to give evidence and could only offer general support for his concerns. (S.F. Vol. VIII at 1924-1931). Mr. Cooksey offered no other evidence, such as newspaper stories or radio and television stories regarding the extent of the publicity. Given this

paultry showing in support of the motion, it is not surprising that the court denied it. In fact the publicity was pervasive and witnesses could have been found who would have testified that it was impossible for the defendant to receive a fair trial in the atmosphere that prevailed. (Affidavit of Clyde Lee, Exhibit G).

53. Several times during voir dire, trial counsel told prospective jurors that if the defendant testified at a criminal trial, he waived the ability to challenge the sufficiency of the evidence to support the conviction if he was convicted. That was simply an incorrect statement of the law. In fact, the law at that time was that if a defendant moved for a directed acquittal, at the close of the State's case, then testified, he waived the right to challenge the court's denial of the motion. It was also true that if a defendant testified at the second phase of his trial that he had committed the crime, he could not then challenge the sufficiency of the evidence.

54. While the jury's understanding of that statement may not have been critical to the case, Mr. Cooksey's misunderstanding of the law was critical to the advice he likely gave to Mr. Banks about not testifying. Mr. Banks, who testified at the punishment phase of his trial, offered a credible explanation for his actions when asked and said that he had not committed the murder. Such information would have certainly been highly relevant and quite significant for the jury to have when evaluating his guilt. The only reasonable explanation for Mr. Banks not testifying is that his attorney tragically misunderstood the law and, through an interaction of counsel's advice and Mr. Banks' mental dysfunctions, deprived Mr. Banks of his opportunity to tell the jury what happened. Such an error, with such dire consequences, cannot be harmless and must be corrected by this Court.

C. Deficient Trial Performance

55. During the trial, Mr. Cooksey's cross-examination of key State's witnesses was painfully inadequate. As previously noted, he did not pursue the time and date of death with the medical examiner, though they varied significantly from that claimed by the State and could have absolved Mr. Banks of guilt in the case. Trial counsel did not question Mike Fisher closely about the purported gunshots he heard in the early morning hours of April 12, 1980, which were the only evidence used by the State to establish time of death. Charles Cook's version of Mr. Banks' confession to killing the deceased varied from the facts in significant respects that were never brought out by defense counsel. Cook's version has Mr. Banks shooting Mr. Whitehead four times and running over his legs with a car. (S.F. Vol. VIII at 2127). The autopsy report shows that the victim was shot only three times and was not run over by a car. (Exhibit R). Cook identified the gun shown to him by the State while testifying as the gun he received from Mr. Banks, but had no way of doing that. There was no testimony that he had marked the gun or that it was in any way extraordinary. Defense counsel did not cross-examine him about it.

56. Defense counsel did little or nothing to challenge parts of Cook's story ripe for cross-examination. Cook never explained the incongruous situation of him allowing a person he knew had confessed to murder to stay in his family's home. He did not explain why he took it on himself to get rid of the car or to sell the only gun that Mr. Banks had with him. All of these actions point to Mr. Cook being far more than the innocent bystander to events that he claimed to be. Nonetheless, Mr. Cooksey allowed this testimony to stand unchallenged by serious cross-examination.

57. Mr. Cooksey's performance was no better regarding other witnesses. He did not test the stories of any of the people in the Cook household about the events of the week-

end when they said they were joined by Delma Banks. He allowed Bennie Lee Jones to identify the murder weapon without saying how he could do so. He did not question Mr. Jones about why Mr. Cook had sold him the gun. Carol initially said the car Mr. Banks was in was a red Mustang, then corrected herself to say it was a green Mustang. (S.F. Vol. IX at 2187). Again there was no cross-examination. State witnesses regarding ballistics and fingerprinting were not cross-examined to any degree. Mr. Cooksey allowed the State through its witnesses testifying about the wound to the bridge of the nose of the deceased to give the jury the impression that the shot was "right between the eyes" and penetrated the skull. In fact, that shot traveled essentially *down* through the face, exiting from the lower cheek of the deceased without doing any damage to his brain—the path of the bullet was not front to back, but top to bottom in essentially a vertical plane. (S.F. Vol. IX at 2217; *see also* Exhibit R). Despite the availability of these facts, Cooksey allowed the prosecutors repeatedly to insinuate through questions, and to argue to the jury, that the same wound was from a shot fired at a 90-degree angle into the plane of the face.

58. After carefully examining his client in the judge's chambers regarding his understanding of his right not to testify, Mr. Cooksey then emphasized that failure to the jury by announcing in open court that the defendant was not testifying on counsel's advice. (S.F. Vol. IX at 2259). The effect of this was extremely prejudicial because it could well have indicated to a reasonable juror that Mr. Cooksey did not believe Delma to be innocent.

59. The defense rested at the first stage of the trial without producing any evidence at all. There was much that could have been offered. Demetra Jefferson could have testified that the reason Delma went to Dallas was to look for a place for them to live. He and Demetra were living together at the time with their four children. She also knew that Robert Farr

illegally obtained prescription drugs and served as a snitch for law enforcement agencies. Finally she could have testified that sometime between April 11, 1980 and April 24, 1980, Deputy Sheriff Willie Huff came to her mother's house and took her brother Vetrano Jefferson away with him. He took Vetrano to the Little Brown Jug in Texarkana and offered to give Vetrano a gun so that he could "blow Delma's head off." He further promised that if Vetrano did that, he would make sure nothing would happen to Vetrano. Vetrano declined Huff's offer. Mr. Cooksey should have been aware of this information, as Ms. Jefferson had previously given it to Dennis Waters during an interview with him. (Affidavit of Rob Owen re Demetra Jefferson, Appendix M).

60. Demetra Jefferson's information would have been useful to offer an alternative explanation for Delma's trip to Dallas on April 12 or 13. It also could have provided cross-examination material with which to challenge the credibility of Vetrano Jefferson, Robert Farr, and Willie Huff. Farr's credibility would have been further weakened had James Kelley and Gary Owen, who testified at the punishment phase about Farr's drug use, his trying to illegally obtain prescription drugs, his use by law enforcement as a snitch and Farr's lack of reliability in that role, been called to testify at the guilt stage. Given the key role Farr played in the case concerning the gun, there would have been no strategic or tactical reason for holding those witnesses until the punishment phase. Of course, Kelley's testimony at the punishment phase that Farr had told him Mr. Banks did not commit the murder could also have been very useful as cross-examination material. (S.F. Vol. IX at 2373).

61. Even someone as easy to locate as a competent auto mechanic could have added significantly to the defense of Mr. Banks: The problem with Mr. Whitehead's car that was described by Patricia Hicks and Patty Bungardt undoubtedly was an electrical problem with the battery or alternator.

Regardless of which it was, there is no way that the car could have been driven from Texarkana to Dallas without stopping several times alongside the road, an unlikely scenario, or a significant amount of electrical work being done to the car. (Affidavit of _____ Appendix _____). There is no evidence of the latter having been done between the time Mr. Whitehead was last seen and the time Charles Cook reported seeing the Mustang in Dallas. He also said in a statement he gave to police that he drove the car around a lot. *He described no electrical problems.* At a minimum, evidence from an auto mechanic regarding the electrical problem would have given Mr. Cooksey more ammunition with which to cross-examine Charles Cook, and may well have indicated that the Mustang never arrived in Dallas at all.

62. The same inexplicable failure of defense counsel to present evidence permeates the punishment phase of the trial. Vetrano Jefferson's fight with Mr. Banks was central to the State's contention that Delma should receive the death penalty. The jury never knew, however, that Mr. Banks hit Vetrano to protect Demetra Jefferson, who was then pregnant with Mr. Banks' twin boys. Vetrano Jefferson had been drinking, began to argue with his sister Demetra, then threatened to hit her. Mr. Banks warned him not to do that and Vetrano replied that he would hit Demetra if he wanted to, even if she was pregnant. When he was about to hit her, Delma pulled a gun from his pocket and hit Vetrano in the face with it. Demetra would also have said, if called to the stand, that Delma never threatened Vetrano's life, as Vetrano testified. (Affidavit of Rob Owen re Demetra Jefferson, Exhibit M).

63. Of course, this account would have created a dramatically different impression of Delma than the jury actually received. There could be no strategic reason for not calling Demetra Jefferson to the stand to explain the entire context of the incident. Mr. Cooksey should have known about this

information because Ms. Jefferson had given it to Dennis Waters. *Id.*

64. As mentioned above, trial counsel did an exceedingly poor job of presenting information through the people who testified on behalf of Mr. Banks at the punishment phase of the trial. His examinations were very brief and did not begin to plumb the depths of the knowledge of Mr. Banks that these people, such as one of his teachers and his employer, should have had. It is incredible that Mr. Cooksey, during a conference in the Court's chambers with Judge Pesek and Delma present, suggested to Delma that the rest of the witnesses ready to testify for Delma should not do so. (S.F. Vol. IX at 2358). Seven of those people remained and Mr. Cooksey demanded the Delma tell him who to call:

> What I want to know is out of these people listed on this yellow sheet that I have just named, who in there, since I don't know these people, I don't know any of these people, I don't know how well they know you and how long they have known you. You know that. You know them a whole lot better than I do. Who on this list do you want me to call?

(S.F. Vol. IX at 2359). With his client's life on the line, trial counsel did not want to let the jury hear all of the people who were prepared to tell the jury that Delma should live—worse, he did not even know what those people could say.

65. The reason he did not know any of these people is that they were only present in court because he had had Mrs. Banks call them, late the night before, after Delma had been convicted, and agree to testify. The people she called agreed to come, but of course there was no way Mr. Cooksey at that late date could have fully investigated the potential of their testimony and used his expertise, such as it was, to determine how it should best be presented. (Exhibit B).

66. Trial counsel's feeble performance continued during closing arguments of the State at both phases of the trial. Numerous prejudicial and improper remarks were made by the prosecutors without objection. This misconduct is discussed in detail *infra*.

67. Mr. Cooksey's final address to the jury was hopelessly ineffective. For a mere seven minutes, he argued for his client's life. During that brief statement, he told the jury that, "on the evidence, Delma did a terrible thing," and that his client kept bad company. (S.F. Vol. IX at 2414). He also spent much of his short speech talking about a man who never even testified, Dr. Grigson. His positive comments about the client he had represented for five months were limited to one paragraph, and did not even cover all of the information given by the defense witnesses. A juror would have to be very generous to Mr. Cooksey to find that his closing showed sincerity or a belief that his client should live.

68. All of the errors referred to above deprived Delma Banks, Jr. of his right to the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Art. I, §§ 10, 13 and 19 of the Texas Constitution. For all these reasons, Mr. Banks is entitled to a new trial.

* * * *

THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT WHICH DENIED MR. BANKS A FAIR TRIAL.

102. The actions of the prosecutors in Mr. Banks' case were lawless and outrageous, profoundly distorting the truth-seeking function of the trial and wholly denying him due process of law. Their actions, including but by no means limited to those examples which follow, deprived Mr. Banks of rights guaranteed him by the federal Constitution and by

the Constitution and laws of the State of Texas. Mr. Banks' conviction and sentence of death therefore must be reversed.

103. First and foremost, the prosecutors engaged in a pattern of practices informed by racial discrimination, designed to assemble all-white juries and to impose harsher sentences in cases of crimes against whites. Their jury selection policies were designed to preclude black citizens from service on criminal petit juries by the calculated exercise of peremptory strikes on the basis of race, and their decision to seek the death penalty against Mr. Banks was consciously informed by the interracial nature of the crime.

104. Equally reprehensible, the prosecutors in Mr. Banks' case engaged in the wholesale misrepresentation of material facts to the jury at both phases of trial. As extensively detailed elsewhere in this Petition, the prosecutors concealed promises of leniency and favorable treatment made to key State's witness Charles Cook. Had this evidence been disclosed to the defense, as required by *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963), the jury likely would have rejected Cook's testimony and acquitted Mr. Banks.

105. In addition, as detailed elsewhere in this Petition, the prosecutors in Mr. Banks' case introduced and emphasized inflammatory "victim impact" evidence at every stage of trial. While some quantity of such evidence may be admissible at the sentencing phase of a capital trial, its introduction at the *guilt* phase of Mr. Banks' trial was intended to transform the trial into a "rush to judgment." As a result, Mr. Banks' guilt was measured not by the strength of the prosecution's evidence, but by the perceived tragedy of the victims' deaths. Equally important, *even if* such evidence might otherwise have been admissible, its introduction in Mr. Banks' case violated fundamental fairness because, upon information and belief, the prosecution simultaneously *concealed* evidence

that the deceased teenager was hardly the model youth the State made him out to be.

106. The prosecutors also knowingly presented misleading testimony during the examining trial, when witness Willie Huff intentionally left out the name of Robert Farr when describing Delma Banks' companions on the trip resulting in his arrest. This lie by omission was calculated to injure Mr. Banks by hiding Farr's identity, and thus secreting him from investigation or interviews by the defense.

107. The prosecutorial misconduct in Mr. Banks' case continued throughout voir dire, when the prosecutors took care to misstate the law to numerous prospective jurors. They repeatedly suggested that the meaning of "deliberate" conduct as comprehended by the first special issue of former Art. 37.071 was equivalent to "intentional" conduct as determined during the guilt phase. This knowing misstatement of the law violated the prosecutors' paramount duty to "do justice," rather than secure a conviction--or, in this case, a death sentence.

108. The prosecutors in Mr. Banks' case also engaged in inflammatory and materially misleading jury argument at both phases of trial. At the guilt phase, the prosecutors' misconduct included an astonishing litany of repeated references to their personal belief in the strength of the State's case. *See* S.F. Vol VIII at 2269 ("I'm proud of what Deputy Willie Huff found . . . . To begin with, he brings us the truth and like I said, this is a search for truth"); *id.* ("he went a step further and he solved for us one of the questions we have to answer"); 2270 ("Aren't we glad that we've got experts to help us find out the truth about these matters?"); *id.* ("Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it?"); *id.* ("Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth."); *id.* ("in order to bring you the whole

truth, we call [sic] as our witness Marcus Jefferson"); 2271("I ask you to search your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengence [sic] or for advantage or to save their hides. I didn't see any.[8]"; 2272 ("murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did"); 2273 ("We take our witnesses and we take the proof as it is given to us as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you *absolute truth*") (emphasis added); 2276 ("Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth and that's ample evidence that Charles Cook is telling the truth. That doesn't lie"); 2277 ("He [Whiteurs] told you the truth"); 2281 ("You know he [Whiteurs] told the truth").

109. It is well settled in Texas that a prosecutor commits reversible error when he attempts to bolster the credibility of witnesses with his personal opinion. *Gardner v. State*, 730 S.W.2d 675 (Tex. Crim. App. 1987); *Robillard v. State*, 641 S.W.2d 910 (Tex. Crim. App. 1983); *Menefee v. State*, 614 S.W.2d 167 (Tex. Crim. App. 1981). The Court of Criminal Appeals has "on many occasions condemned any effort on the part of the State to bolster the credibility of its witnesses by unsworn testimony." *Brown v. State*, 309 S.W.2d 452, 453 (Tex. Crim. App. 1958). "[D]etermination of the credibility of a witness is the job of the factfinder, not investigators and prosecutors. It is thus improper to suggest to the jury that they should defer to another's assessment of the truthfulness of testimony, no matter how 'experienced' that other may be."

[8] Of course, this argument has the added feature of being *a lie*, as well as being improper; the prosecutors knew, at a minimum, that Charles Cook had a reason to testify in favorably "for advantage or to save [his] hide," since, he was facing a possible life sentence on other charges if he chose not to cooperate.

Gardner, 730 S.W.2d at 698. The extreme nature of the violation in Mr. Banks' case, with the prosecutors' relentless insistence that their witnesses were telling the "truth," denied him a fundamentally fair trial, as guaranteed by the Sixth and Fourteenth Amendments.

110. Further, the prosecutors' guilt-phase closing arguments contained other impermissibly inflammatory arguments that deprived the proceeding of fundamental fairness. *See, e.g.*, S.F. Vol. VIII at 2303 ("We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County"); ("I want you to go from this place proud and holding your head high. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed").

111. The prosecutors also, again and again, urged the jury to consider the feelings of the victims' families in determining Mr. Banks' *guilt*. *See* S.F. Vol. VIII at 2267 (discussing the grief of the deceased's father); 2268 (describing the deceased's stellar character); 2270 (urging jury to weigh the "rights" of the deceased in determining *guilt*); 2278 (deploring that the deceased will "never see our rain" or "feel the warm sunshine on his cheeks"). While some such argument might, within Constitutional limits, be permitted at the punishment phase, each of these passages occurred during the *guilt*-phase argument. This misconduct, too, demands that Mr. Banks' conviction be reversed.

112. One additional argument deserves mention; during his guilt-phase closing argument, one prosecutor addressed the identification evidence proffered by the State:

> If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery.

Id. at 2266. It is impossible to imagine this metaphor—of Mr. Banks as a beast to be skinned—being used to describe a white person. In the tradition of the most despicable cross-burning demagoguery, this dehumanizing phrase was calculated to focus the jury's attention on the *color* Mr. Banks' "hide," and the difference between his color and that of his alleged victim. This racist tirade alone requires the reversal of Mr. Banks' conviction.

113. The prosecutors' misconduct continued in their punishment phase arguments. Among other impermissible pleas, the State's attorneys hammered on the inflammatory victim-impact evidence they had presented at both phases of trial. All these arguments, severally and collectively, deprived Mr. Banks of a fundamentally fair trial.

114. Further, upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363 U.S. 83 (1963). This evidence included information that pointed to another suspect in the murder, information that linked prosecution star witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

115. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Banks by the federal Constitution and the Constitution and laws of the State of Texas was to deny him a fundamentally fair trial. Mr. Banks'

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Signatures omitted in printing

Certificate of service omitted in printing

AFFIDAVIT OF DELMA BANKS, SR.

State of Texas)
) ss
County of Bowie)

Before me, the undersigned authority, appeared Delma Banks, Sr., who upon his oath deposes and states:

1. My name is Delma Banks, Sr. I am over eighteen years of age and am otherwise competent to make this statement,

2. I am the natural father of Delma Banks, Jr., who was convicted of capital murder in Bowie County, Texas in September, 1980.

3. When Delma, Jr. was in the third or fourth grade, he had a lot of trouble with his grades and was held back a year in school.

4. When Delma was very young and in elementary school, I received word from his principal, Mr. McGill, that he had been tricking some of the other boys at school out of their lunch money. To discipline him for that, when he got home, I tied him to a tree next to the house and whipped him with a leather belt or strap. I told him I would leave him tied to the tree all night and went away, to where he could not see me. I intended to watch him to see what he would do and to make sure nothing happened to him, but a neighbor let him loose from the tree. I never heard again that he was causing other people trouble at school.

5. Mrs. Banks and I hired Lynn Cooksey to represent Delma, Sr. because we heard that he was the best criminal lawyer in Texarkana. He said the fee would be $10,000, but we could pay $1,000 down and the rest on payments. He said he would set up a payment plan for us when we came to his office sometime. We went to his office a few times before the trial, but he never set up any plan and the most that we paid him was $1,500. He also told us at the time we hired him that

he wanted to have Dennis Waters, a private investigator, work with him. He said Mr. Waters' fee would be $1,500 and that we had to pay that immediately. We gave Mr. Waters the money in cash (initialed D.B.) in his office. The fees we paid to Mr. Cooksey and Mr. Waters used all of the money we had saved. We were poor people and made very little money.

6. Mr. Cooksey and Mr. Waters talked to us a few times about the case. Neither of them did anything to prepare me to testify at the punishment part of my son's trial. Mr. Cooksey just put me on the stand and had me answer his questions. They never asked me anything about Delma's childhood or personality.

7. One time Mr. Waters came to my house before the trial and told me that I should go to see a person who lived on my street who (initialed D.B.) might know something about the murder of the Whitehead boy. I told him that was his job. As far as I know he never talked to the person.

8. During the weeks before my son Delma, Jr.'s trial, my family received threats of physical violence by telephone from a number of unknown people. My wife was very frightened and moved with our children who were at home to live with her mother. During that time, we also changed our telephone number to try to avoid the calls.

9. Before my son's trial, my wife and I were leaving a meeting with Mr. Cooksey at his office. As we were leaving the building, looked back inside and saw Richard Whitehead's parents going into Mr. Cooksey's private office.

10. During my son's murder trial, I did not get to listen to the testimony in the courtroom because the District Attorney said I might be called as a witness for him and the judge made me stay outside the courtroom. My wife was kept out of the courtroom for the same reason. While we were outside the courtroom in the hallway, we never threatened anyone or caused any trouble to anyone. Somebody said we did, though,

and at one time during the trial, the judge called everyone in the hall into the courtroom and told us to stop threatening people. We did not know why he was doing that.

11. Before the testimony ended at the first part of the trial where the jury found Delma, Jr. guilty of killing Richard Whitehead, one morning Mr. Cooksey talked with my wife right outside the courthouse about testifying for Delma, Jr. at the first part of the trial. I did not hear all of the conversation, but I saw Mr. Cooksey grab my wife by her shoulders and shake her. Right away, I went to where they were at. As he shook her, he said, "What kind of a mother are you, that you won't tell a little white lie to save your son?" My daughter Jeannie was standing there too. I told him to take hands off of my wife and he did. She told him she would not lie on the stand like he had asked her to.

12. During my son's trial, while the jury was deliberating about whether to find him guilty of the murder, Mr. Cooksey asked me (initialed D.B.) and Elder G. N. Ford to meet with him and with Delma in a room near the courtroom. He said that if Delma, Jr. would say that he had killed Richard Whitehead, then the trial would end and he would get life in prison. He said he had talked with Judge Pesek and knew this would happen if Delma. Jr. cooperated. Mr. Cooksey said that if Delma. Jr. got a life sentence, he would be out in 7 or 8 years. He asked me to persuade Delma, Jr. to say that he had done it and I told him it was up to my son to decide what to say. Delma, Jr. refused to go along with Mr. Cooksey's idea, saying that he had not killed Richard Whitehead and would not lie like he had asked her to.

13. At no time after murder charges were filed against my son did I know that two lawyers, Jim Davis and Jim Hooper, were appointed by the court to represent him in the trial. I always that Mr. Cooksey was the lawyer after we hired him shortly after Delma Jr.'s arrest. I never heard from Mr. Davis

or Mr Hooper, nor was told by the court that they had been assigned to the case.

Further affiant sayeth not.

I affirm that the foregoing statement is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.

/s/ Delma Banks, Sr.
DELMA BANKS, SR.

Signed and sworn before me this 10th day of January,1992.

/s/ _____

Notary Public, State of Texas

My commission Expires: 08/03/93

(Initialed e.b.)

AFFIDAVIT OF ELLEAN BANKS

State of Texas)
)
Bowie County)

Before me, the undersigned authority, appeared Ms. (initialed e.b.) Ellean Banks, who upon her oath states that the following is true and correct to the best of her knowledge and belief:

1. My name is Ms. (initialed e.b.) Ellean Banks. I live on Cemetary Road in Nash, Texas. Delma Banks, Jr., is my oldest son, the second oldest of my six children.

2. I am from Texarkana, but at the time that Delma, Jr. was born, we were living in Ft. Worth. Our family at that time was just my husband Delma Sr., our baby daughter Jeannie, and me. My labor with Delma Jr. was very long and difficult. It lasted for nearly twelve hours. He was a big baby, and I had a hard time giving birth. I was very glad that he seemed healthy when he was finally born.

3. However, only three or four days later, Delma, Jr. developed a bad rash. I took him to one doctor after another, and they gave him medicines and did tests to see what was causing the rash. It took a long time for them to figure out what was wrong, but they finally did. They told me that Delma Jr. was "hyperallergenic," or allergic to almost everything. They tried all kinds of medicines to cure him, and told me there were lots of foods that he shouldn't eat. But we didn't have much money to buy different food from what the rest of the family ate, and anyway it would have been nearly impossible to keep a child from eating the things he wanted to eat.

4. Delma Jr. was allergic to so many things. He couldn't even be around fish, without breaking out, and chicken was even worse. His father Delma Sr. aas working at a chicken

plant for a while, and Delma Jr. would get a terrible rash if his father even touched and played with him. It didn't matter if Delma Sr. took a shower and changed clothes, or whatever; it seemed like he just couldn't get enough of that chicken off of him to keep from giving Derma Jr. a bad rash. I think Delma Sr. ended up changing jobs because of that.

5. When Delma Jr. was little, and his allergies made him break out in hives, I almost never got a night's sleep. He would fuss and fuss all night, because he hurt so bad. I remember that I used to put socks on his little hands, and pin the socks to his diaper, to try to keep him from scratching at his face and arms. One time I did that, and many times when I woke up later and checked on him, Derma Jr. was rubbing his face on the pillow, twisting and turning his head, trying to scratch the rash on his face. He had rubbed his face completely raw, and his pillow was all bloody. I felt so sorry for him, and lots of times I lay awake and wondered what I could have done to have caused him to be sick that way.

6. Sometimes Delta Jr.'s allergies were life-threatening. I remember that one time when he was (initialed e.b.) about one year old he got a penicillin shot, and his face swelled up like a balloon. I was terribly afraid of what would happen to Delma Jr., but he survived. The doctor told us, though, that if it ever happened again, it might kill him. I went out and bought one of those little tags for him to wear, so that if I wasn't around people would still know that he was allergic to penicillin.

7. Delta Jr.'s allergies were a hard load for him to bear. They weren't the only bad thing about his childhood, however. My husband,. Delma Sr., had a terrible drinking problem, and his drinking nearly tore our family apart. I had not known when I met him that he could drink so heavily, or how awfully it would affect him. My family had been very Christian and strict, and I had had no experience with such things. I soon found out, to my sorrow. I don't like to talk about it such, because it was so terrible; Delma Sr. would get

drunk and he would get angry and holler at me. I would cry, because I was so afraid, and the children were terrified. I would take the children and run away, sometimes to my mother's, sometimes to other places. Later, of course, Delma Sr. would tell me that he was going to be better, and that he was going to stop drinking, and I always took him back. Before long, however, he would go to drinking again and the whole thing would start over. I thank God that, years later Delma Sr. finally gave up drinking for good, although that was years after Delma Jr. was grown. Even though my husband finally beat his drinking problem, I have often thought that if I had it to do over again, I would rather not have had my children, than to have made them suffer Delma Sr.'s drinking.

8. In Fort Worth, I worked in the housekeeping department at Peter Smith Hospital. When I had to work in the mornings, I would cook breakfast for the kids and leave it on the stove for them to eat when they woke up. One morning when Delma Jr. was about (initialed e.b.) three years old, he got up to eat and decided to turn on the stove. Kids are always imitating something they have seen a grown-up do, and I'm sure that's what Delma Jr. was doing. He turned on the burner, and because he didn't know how to turn it off, it got too hot and caught the food on fire. The food caught the wall on fire, and the fire spread quickly. Delma's sister Jeannie, who was only two years older than him, got him and woke up Delma Sr., and they all managed to get out of the house. The fire burned down nearly the whole house, but I was just glad that no one was hurt. I think that Delma Jr. has always felt very guilty about starting the fire, even though he was little and didn't mean any harm.

9. One winter, when Delma Jr. was about seven years old, after we had moved back to Texarkana, he was playing with some other kids out in the road in front of our house. It had rained and then frozen, and so the road was slick with ice. The kids were running and sliding on the ice. Delma's feet

went out from under him, and he fell down hard and hit the back of his head. The skin was broken and bleeding, so I took him down to the doctor to have him stitched back up. It was a pretty bad bump.

10. Delma Jr.'s allergies and the sores he always had really affected him when he was little. He was so self-conscious about how his arms and legs looked, and about the sores that his allergies caused him. He got teased a lot, and that made things even worse for him. Delma Jr. wanted so bad to play sports, but be was so ashamed of the sores on his arms and legs that he never wore short pants or a short-sleeved shirt. He would wear a long-sleeved shirt in the middle of summer, he was so concerned to cover up the sores. He used to get so mad that he would say to me, "Mama, why was I even born?" I felt terrible knowing how upset he was, and I tried to let him know how much I loved him, but he was always at the mercy of his allergies.

11. As Delma Jr. got older, I think that he continued to feel bad about himself because of the sores on his arms and legs. I know that he did not do well in high school, and that he finally left school for good when he was in the tenth grade. I don't know why he left. After Delma Jr. left school, he went into the Job Corps for a while, but he didn't stay there long. When he got back to Texarkana, he told us that he wanted to go in the Army. But before he could go in, he had to pass a physical, and the doctors rejected him because of his allergies and his skin condition. Delma Jr. was so disappointed he could hardly stand it, and I remember him saying again, "Mama, why was I born?"

12. After Delma Jr. left school, I think he got in with a bad crowd. I remember Robert Farr in particular; he was an older man, and I thought it was very strange that he was always hanging around with those younger boys. He would come over to our house, and sit on the porch, and say to Delma Jr., "Bring me something to eat," like Delma Jr. was his servant.

Delma Jr. would always go do it. Of course, Delma Jr. had always been the kind of boy who would do what other people told him; he was kind of a follower that way. He even took the blame, sometimes, for things I found out later that he had not done at all. I think he must have just been eager to please people, because his illness had left him with few close friends.

13. The racial prejudice that surrounded my son's trial caused our whole family fear and worry. Before the trial, we used to get threatening phone calls. I am sure that the people who called were white people. They used to threaten violence against Delma Jr. and against the rest of our family. One time, a crowd of young white people came down our street and right to our yard. My husband called the police, and the police came and ran them off, but I was still very afraid. In fact, because of the threatening calls, I ended up taking my children and moving in with my mother for almost a year.

14. One day while the jury aas still being picked for my son's trial, I and my husband Delma Sr. and my daughter Jeannie were talking to Lynn Cooksey outside the old courthouse in New Boston. Lynn Cooksey told me that he had decided that the only way to keep Delma Jr. from being convicted was to have me testify that Delma had been at home with our family on the night the boy was killed, and that I knew he had been there. I told Mr. Cooksey that no matter how much I loved my son, I could not lie to save him. He grabbed me by the shoulders and shook me hard, and said, "What kind of mother are you that won't tell a little to lie to save your own son?" Delma Sr. got mad at him and told him to get his hands off of me. He did, but he still wanted me to get on the stand and lie. I told him I wouldn't. My husband Delma Sr. stepped in and said *he* would take the stand and tell the story, but Mr. Cooksey said, "NO; we have to have the mother." I told him that I was not going to lie.

15. The night the jury convicted my son, they were out until very late, after 11:00 p.m. After they came back in with the guilty verdict, before we left the courthouse, Lynn Cooksey told me to get every black preacher I could find up to the courthouse the next morning. He didn't say what for. I went home and got on the phone and called people until three o'clock in the morning, and many of them came to the courthouse the next morning. However, Mr. Cooksey never took them aside or talked to them about what was happening, or what he might ask them if he called them to the stand. (initialed e.b.) Some of them had missed work to be there, and were not even called to testify.

16. Mr. Cooksey called me to the witness stand during that part of the trial. I was nervous and scared because of what was happening to my son, and I had no idea what Mr. Cooksey was going to ask me or what exactly I could say to help Delma Jr. Mr. Cooksey had never said to me what he planned to do if the jury found Delma Jr. guilty, and he had never taken me aside and talked to me about what he would ask me if I testified. I just begged the jury to spare my son's life, but if Mr. Cooksey had helped me get ready to testify I know I could have told the jury more important things about my son's life.

17. After the jury had gone out to decide their verdict, I asked Mr. Cooksey in the courtroom, "what are they going to do to my son?" He said, "They are going to kill him." He said that if the Whitehead boy had been black, he could have gotten Delma off with (initialed e.b.) probation.

Further affiant sayeth not.

I have read the foregoing affidavit, with paragraphs numbered 1 through 17, and it is true and correct to the best of my knowledge and belief. I so state, under the pains and penalties of perjury.

/s/ Ellean Banks
ELLEAN BANKS

Signed and sworn before me this 10th day of January, 1992.

/s/ _____
Notary Public, State of Texas

My commission expires: 08-03-93

(ss).

AFFIDAVIT OF PATRICK DELAUNE

County of Travis)
)
State of Texas)

1. My name is Patrick DeLaune. I currently reside in Austin, Texas. I am over eighteen years of age.

2. I am an investigator for the Texas Resource Center. In January 1992, I investigated circumstances surrounding the capital murder trial of Delma Banks, Jr. In that professional capacity, I spoke with Charles Cook, who testified at the trial. I spoke with Mr. Cook on January 10, 1992, at his residence in Dallas, Texas. We spoke from approximately 4:30 pm to 7:30 pm. During the last 1/2 hour of the interview, approximately, Mr. Cook's mother and friend were present.

3. Mr. Cook related information to me concerning his circumstances prior to his testimony. According to Mr. Cook, immediately before officials in Dallas obtained his first written statement concerning his knowledge of Delma Banks, those officials said that Delma was accusing Charles of being involved in the Whitehead murder. Mr. Cook indicated they were doing this as a way to encourage him to make a statement. Mr. Cook learned at a later time that Delma Banks had never made such accusations.

4. Mr. Cook also said that, when the authorities from Texarkana told him he needed to testify at the trial, they had him afraid of what might happen if he did not testify. Mr. Cook remembers them saying, we got your ass back in Dallas on a habitual, a life sentence. They said they could make the case come down hard on him, and that he'd be facing life in prison for it, if he did not help them out.

5. The authorities also threatened that they could charge him with being an accessory to capital murder, if he did not cooperate. He believed that they were serious and that he might be facing two life terms in prison if he did not

cooperate. When this investigator pointed out to Mr. Cook that he denied on the stand the information he was giving at present, another person in the room suggested that the prosecution had instructed him not to disclose such information while testifying. Mr. Cook acknowledged this suggestion.

6. Mr. Cook described rehearsals of his testimony, which took place in Texarkana shortly before the trial. He says that while he was in jail awaiting the trial, on three separate occasions, each on a different day, he went into the courtroom to rehearse his testimony. He recalls the lawyers for the state being present at all of these rehearsals. On each occasion, the lawyers would carefully go over what they wanted him to say on the stand.

I have read the foregoing statement, and swear under pain and penalty of perjury that it is true and correct to the best of my knowledge.

/s/ Patrick DeLaune
PATRICK DELAUNE

Subscribed and sworn to before me this 13th day of January, 1992.

_____
Notary Public, State of Texas

My commission Expired: 08-03-93

AFFIDAVIT OF DEMETRA JEFFERSON

State of Texas)
)
Bowie County)

Before me, the undersigned, authority, appeared Demetra Jefferson, who upon her oath deposes and says that the following is true and correct, to the best of her knowledge and belief:

1. My name is Demetra Jefferson. I live at the Town North Apartments in Texarkana, Texas. I am a lifelong close friend of Delma Banks, Jr., and the mother of four children by him.

2. In April, 1980, Delma Jr. and I had been romantically involved with one another for a long time, we had met in school. I was pregnant with our twin sons, and we were living at a house my mother had previously lived in, on 18th Street in Texarkana.

3. About a week before the Whitehead boy was murdered, Delma Jr. and my brother Vetrano were at the house where Delma Jr. and I were living. My brother had been drinking, and before long there was an argument and my brother threatened to hit me. Delma Jr. told him he had better not try. Vetrano told Delma Jr. that he would hit me if he wanted to, regardless of whether I was pregnant. But when he was about to, Delma Jr. pulled a gun out of his pants pocket and hit Vetrano in the face with it, to keep him from hitting me. Delma Jr. never threatened to kill Vetrano.

4. I was upset and scared, so Delma and I and our kids spent the night in a motel. Delma Jr. told my mother what had happened, but Vetrano went down to the police station and filed an assault or maybe attempted murder charge on Delma anyway. Delma Jr. then made himself scarce around the house, since he was afraid that the police were going to come looking for him there. When I talked with him, he

talked about our getting the family away from there, and maybe moving us and our kids to Dallas.

5. On the morning of April 11, Delma Jr. was discussing going away to Dallas to check things out and look into moving our family there. He told me he had picked up his last check and was going to head to Dallas. I told him I wanted to go with him, that we could all go as a family, but he said that it would be better for him to go first, and that we could come along as soon as he settled.

6. It was raining that night. I went to sleep in the evening, and was awakened when Delma Jr. came to the front door. He was with Richard Whitehead, whom I recognized both because I had seen him at school and because Delma Jr. told me who he was. They were riding in a green Mustang, and Richard was driving. Richard stayed in the car while Delma Jr. came up to the door. Delma Jr. told me that he had changed his mind and wasn't going to leave. Before he went back to the car and left with Richard, I noticed that Delma Jr. was missing *another* front tooth, and that there was a smudge of blood at the corner of his mouth. I figured that he and Richard had been in a fight against some other people. I didn't know what had happened. Richard was known at school as a source for illegal drugs. He sold marijuana, and also sold prescription drugs, and did both on campus.

7. My sister Sharon was married to a guy named Robert Farr, who was also heavily into prescription drugs. He had a bullet in his head, as a result of a shooting, and so was able often to obtain prescription drugs. He also used to steal prescription pads and write out his own. He was well-connected to law enforcement people, however, which kept him from getting in trouble for that.

8. During the two weeks or so between April 11 and when Delma Jr. was arrested, Willie Huff came to my mother's house. Willie Huff was a law officer. He took my brother

Vetrano away from the house. Vetrano told me and my parents afterward that Huff had taken him to the Little Brown Jug. At the Little Brown Jug, Huff had told him that he understood that Vetrano had a problem with Delma Jr. He offered to give Vetrano a gun so that he could "blow Delma's head off," and promised that he would make sure that nothing would happen to Vetrano if he did so. Vetrano told Huff that he would stick with the court charges against Delma. Then, when Huff brought him back to our house, Vetrano told me and my parents about the whole thing.

9. After Delma Jr. was arrested, in fact, Vetrano agreed to drop the charges he had made against Delma Jr. I called the police to tell them so, and they told me that Vetrano would not be allowed to drop the charges.

10. Lynn Cooksey, Delma Jr.'s attorney, talked to me only during the jury selection. He said that he might need me to testify. I had spoken briefly, for maybe twenty minutes or so, with his investigator Dennis Waters. Waters taped a conversation with me at his office, and spoke to me once at my house. Mr. Banks (Sr.) was also at Waters' office at the time I was there, although he was not present while Waters was speaking with me. I told Waters about what Willie Huff had said to Vetrano, and the whole story about why Delma Jr. had hit Vetrano with his gun.

11. During Delma Jr's trial, I was in the hallway outside the courtroom. Once, there was a break in the trial; because there had been claims that the proceedings needed more security, Delma was being taken out of the courtroom by himself before the jury was allowed to leave or before anyone else left. When he was brought through the doors into the hallway, I could see his hands. They were handcuffed. Through the windows in the courtroom door, I could see that the jury had not left.

12. I am familiar with the pervasive racism of the courts and other institutions in Bowie County. Black people are treated with contempt, and their problems are not treated with seriousness or respect. For example, my father was killed in a bar in 1982, and no one was ever tried for the crime. When I was present in the old courthouse for Delma Jr.'s trial, I was treated very rudely by all the white law officers in the courthouse. My conversations with other black people there confirmed that all the black people in the courthouse were being treated with a mixture of intense hostility and suspicion.

Further affiant sayeth not.

I have read the foregoing affidavit, and I affirm that it is true and correct to the best of ay knowledge and belief, and I so state under the pains and penalties of perjury.

_____

Signed and sworn before me this ___ day of January, 1992.

_____

Notary Public, State. of Texas

AFFIDAVIT OF GREGORIO PINA, III, PH.D.

Hidalgo County)
) ss
State of Texas)

I, Gregorio Pina, III, being first duly sworn on oath, depose and state as follows:

1. I am a duly licensed psychologist with a private practice in McAllen and Laredo, Texas. A complete summary of my experience and qualifications appears in my vita, which is attached to this affidavit as Exhibit A and made a part of it by this reference.

2. In early January, 1992, Mr. Delma Banks, Jr. was referred to me by his attorneys for an evaluation to address issues concerning his intellectual functioning and impairment, currently and in the past. He is a thirty-three year old single male on Death Row at Ellis I Unit penitentiary located in Huntsville, Texas. He is in prison there as a result of being convicted of capital murder in Bowie County, Texas in September, 1980.

3. On January 10, 1992, I administered the following tests to Mr. Banks: The Wechsler Adult Intelligence Scale—Revised (WAIS-R); The Reitan Indiana Aphasia Screening Test, and formal and informal psychoneurological screening. I also conducted a clinical interview regarding the following histories: developmental, medical, educational, drug, vocational, military, mental health, social, marriage, and legal. I further read portions of the written transcription of his discussions of various issues with the judge and his lawyer at the trial, as well as his trial testimony.

4. I was unable to conduct a complete evaluation of Mr. Banks because my evaluation was shortened by 1 1/2 hours due to an error in paperwork by prison officials. My request to continue and complete the evaluation on January 11, 1992

was refused by prison officials, despite the fact that Mr. Banks is scheduled to be executed on January 15, 1992. My evaluation is therefor only able to address areas in which gross deficiencies are present. A complete evaluation will require the administration of additional clinical measuring instruments and I strongly believe that they should be completed regarding Mr. Banks.

5. Mr. Banks was compliant and respectful during the evaluation. He was highly motivated to do everything I asked of him. He did not exhibit symptoms consistent with malingering. I do not believe that fatigue, malingering or any environmental conditions during the evaluation affected the results. Mr. Banks also demonstrated signs of confusion, lack of planning, impaired ability to deal with new situations, and impaired ability to switch from one task to another. He exhibited subtle communication problems and had serious difficulty talking about his personal history. His long term memory appeared to be grossly impaired.

6. At the time of this evaluation, Mr. Banks was functioning in the low average to average range of intelligence. He has a Verbal IQ of 82, a Performance IQ of 93, and a Full Scale IQ of 85. It is important to understand that these IQs represent Mr. Banks' highest levels of functioning in an ideal setting. When he is under substantial stress, he does not function as well intellectally, particularly when the stressful situation chiefly involves listening and responding verbally. A criminal trial at which his life is at stake would be such a profound stressor that it could have a marked negative effect on his intellectual functioning.

7. Mr. Banks' long term memory is terrible. He suffers from diffuse neurological disorder. Significant problems with naming objects, spelling, reading, reading comprehension, and verbal-mathematical problem-solving are also present. The WAIS-R and the Reitan Indiana Aphasia Screening test results indicate that Mr. Banks has suffered brain damage.

This is most clearly shown by his severely impaired long-term verbal memory and his difficulties in speaking and comprehending speech. Mr. Banks has attempted to compensate for these difficulties through enhanced visual memory.

8. My testing indicates that Mr. Banks has had to follow the lead of others because of his neurological problems. The extent of his disabilities is not immediately clear to the casual observer, as he tends to nod, smile and give people verbal responses he believes they expect to receive from him. This style of responding to the world around him makes Mr. Banks appear to others to have more intelligence and comprehension than he does. Such masking behavior is common and expected of people who have the neurological difficulties experienced by Mr. Banks.

9. The most difficult intellectual situation for Mr. Banks to function in is one in which information is being exchanged almost entirely through speech. He is similarly at a great disadvantage when he must try to explain himself to others. Stress further reduces his communication and comprehension capabilities. He decides what to do and say in such uncomfortable situations by watching others carefully and picking up visual cues such as facial expressions and body language. His neurological deficits appear to be so severe that these visual cues often form the primary basis for his decisions. He then acts or speaks in a way that he believes the people he is interacting with want him to, based on the visual cues.

10. Legal proceedings are particularly difficult for Mr. Banks to understand, relying as they do, primarily on complex verbal information. His tendancy is to rely even more heavily than he normally does on visual cues from lawyers and the judge in the courtroom. Particularly in a stressful situation, such as his own trial, he is very susceptible to suggestion and likely to indicate understanding when he has none. The portions of the trial transcript that I read well illustrated these problems.

11. The combination of Mr. Banks' follower personality with his organic brain damage had serious implications for his trial. Unaware of the extent of his disabilities, there was a great potential for both the Court and his lawyer to overestimate his understanding and intelligence. Indeed, his competency to stand trial in 1980 is very much open to question. Closely related to the issue of competency is the issue of communication with legal counsel. Trial counsel in 1980 would had to have been extraordinarily careful and patient in dealing with Mr. Banks to overcome the barrier posed by his neurological deficits in combination with his personality style. It is likely that not only did Mr. Banks not understand much of what was happening at his trial, but he also did not understand much of what his lawyer was saying.

Further affiant sayeth not.

_____

Signed and sworn to before me this 13th day of January, 1992.

_____

Notary Public, State of Texas

IN THE TEXAS COURT OF CRIMINAL APPEALS

[Filed Feb. 24, 1993]

Cause No. ___

EX PARTE DELMA BANKS, JR.,
Petitioner.

AMENDED AFFIDAVIT
OF GREGORIO PINA. Ph.D.

Delma Banks, through undersigned counsel, files herewith the amended affidavit of Dr. Gregorio Pina, in support of the claims for relief in Mr. Banks' Application for Post-Conviction Writ of Habeas Corpus.

Respectfully submitted,

CLIFTON L. HOLMES
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601
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STEVEN HAWKINS
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(212) 219-1900

ATTORNEYS FOR APPLICANT

BY: Robert C. Owen
ROBERT C. OWEN
Texas Bar No. 15371950

AFFIDAVIT OF GREGORIO PINA, III, Ph.D.

State of Texas)
)
Hidalgo County)

Before me, the undersigned authority, personally appeared GREGORIO PINA, III, Ph.D., who upon his oath stated the following:

1. My name is Gregorio, Pina, III. I am a psychologist licensed in the State of Texas (State Board of Examiners of Psychology license # 2180), and am presently in private practice in McAllen, Texas. I specialize in trauma, police, and criminal psychology. A copy of my current curriculum vita is attached to this affidavit.

2. In January, 1992, I evaluated Delma Banks, Jr., an inmate on Texas' Death Row, at the request of his attorneys. I was asked to determine his present intellectual functioning and psychological impairment, if any, and to reach a conclusion, if possible, concerning Mr. Banks' mental status at the time of the offense and trial in 1980. Due to human error at the prison where Mr. Banks is incarcerated, I was not able to complete that initial evaluation, Subsequently, I was asked to complete my assessment, and did so in January, 1993.

3. On the second evaluation, I administered the Wechsler Adult Intelligence Scale—Revised (WAIS-R), the Stanford-Binet Intelligence Scale, the Rorschach (inkblot) test, the Thematic Apperception Test, the Minnesota Multiphasic Personality Inventory (MMPI-2), and formal and informal neuropsychological testing. These neuropsychological tests included the Wechsler Memory Scale—Revised, the Trail Making Test (part A), the Reitan Indiana Aphasia Screening Test, and portions of the Luria Nebraska Neuropsychological Battery.

4. On both occasions, I obtained Mr. Banks' history with respect to the following topics: mental and physical development, past medical treatment, educational background, drug use, vocational experience, mental health treatment, social experience, marriage and sexual history, encounters with the criminal justice system, and adjustment to prison. In addition, I reviewed transcripts from his trial, including conferences between Mr. Banks, the judge, and his attorney, and Mr. Banks' own testimony.

5. Mr. Banks was highly motivated. He became absorbed by the tasks presented, and initiated and maintained tasks without having to be pushed. He was persistent and challenged to do well. I detected no sign of malingering. Other factors that could bias test results, such as fatigue or interference from the test-taking environment, were controlled and were within normal limits.

6. The results of both test batteries are consistent with one another, and I believe accurately reflect Mr. Banks' limited cognitive capacity and psychological impairment. It is critical to note in this regard that Mr. Banks' results on these tests represent his *optimal* capacity in a controlled environment: Psychologists describe such a testing performance as "elevated," since it does not accurately reflect the subject's unadaptive intelligence in the domain of auditory reception and verbal expression. Because of the character of Mr. Banks' impairments, it is highly likely that his performance on all measures would deteriorate markedly if he were called upon to make decisions quickly and under stress, such as the tension of a courtroom proceeding. In particular, several of Mr. Banks' limitations impair his ability to communicate meaningfully; thus, any combination of stress with a need to express himself verbally, or to process verbal information from other sources, would dramatically reduce Mr. Banks' ability to communicate accurately his thoughts and feelings.

7. It is also important to note that as Mr. Banks has aged, he, like persons with similar deficiencies, has learned additional adaptive and coping styles to attempt to compensate for his impairments. Mr. Banks exhibits a type of neurological damage (see below) which may have permitted him to respond positively to structure, by attempting to pair his strengths with his weaknesses. In a highly structured environment, prison, Mr. Banks has used the Bible to learn to read. It is reasonable to assume that, had Mr. Banks remained outside prison, he would not have improved his ability in this regard. As a result, it is my professional opinion, held with a reasonable degree of scientific certainty, that Mr. Banks' test scores on all measures would have been significantly deflated in 1980.

8. Mr. Banks' present intellectual functioning, as measured by the Stanford-Binet IQ test and adjusted for age norms, is in the borderline mentally retarded range (73). As a result of his low cognitive ability, Mr. Banks exhibits subtle communication problems, confusion when switching tasks, an inability to plan, and difficulty processing and responding to new or unexpected situations. His short-term memory falls into the mentally retarded range (subtest score of 68); Mr. Banks' long-term memory, too, especially of childhood experiences, appears deficient.

9. Two different instruments were used in this evaluation to measure Mr. Banks' intellectual functioning: the WAIS-R (see above) and the Stanford-Binet. The WAIS-R was administered in both 1992 and 1993. Mr. Banks' verbal IQ score on the WAIS-R was 82 in 1992, and 75 in 1993; his performance IQ score was 93 in 1992 and 95 in 1993, for a full-scale IQ of 85 in 1992 and 81 in 1993. While these scores might suggest a somewhat higher level of intellectual functioning, it is my professional opinion that Mr. Banks' adjusted score on the Stanford-Binet test (indicating a full-scale IQ of 73) more accurately reflects the severity of his

cognitive deficit. First, the Stanford-Binet is more sensitive to the cultural differences between Caucasian and African-American, subjects; second, I have adjusted Mr. Banks' score for his age, taking into account the fact that the Stanford-Binet norms are computed only through (approximately) age 24. I am confident that Mr. Banks' intellectual functioning may most fairly and accurately be described as in the borderline mentally retarded range.

10. Further, neuropsychological testing indicates that Mr. Banks suffers from an organic brain impairment. His response patterns indicate a mild and diffuse neurological impairment and a learning and language disability. These findings are corroborated by Mr. Banks' poor performance in school; despite his inability to learn, however, he was repeatedly promoted from one grade to the next. He indicates that he did not begin to read adequately until his present incarceration and his study of the Bible.

11. The twenty-point spread between Mr. Banks' verbal and performance IQ scores is statistically significant as an indicator of neurological damage. Mr. Banks' Stanford-Binet Short Term Memory intelligence score of 67, and his Abstract and Visual, Reasoning score of 61, are either in the mentally deficient range or slightly above. The spread between subtests is statistically significant toward a learning and language disability (note: this instrument is standardized only to age twenty-three years, eleven months, fifteen days). Mr. Banks evidenced a spelling disability in several tasks. He was unable to read the MMPI-2, so that it had to be read to him. His Wechsler Memory Scale score is also in the defective range.

12. In addition to his substantial cognitive deficit, Mr. Banks suffers from severe psychological impairments of long standing. He suffers from moderate to severe depression (including periodic suicidal ideation), complicated by feelings of extremely low self-esteem and an almost complete lack of self worth. He also exhibits a remarkable deference to the

apparent will of others; Mr. Banks' eagerness to please, as explained *infra*, is symptomatic of both his low intelligence (he has learned to "go along" in order to "pass" for a person of normal intelligence) and the aforementioned psychological impairments.

13. I noted in my original affidavit in this case (based on the incomplete evaluation described above) that Mr. Banks' long-term memory, especially his historical memory, was extremely deficient. The completed evaluation has revealed the likely reason for Mr. Banks' memory problems, namely, the experience of trauma at an early age which has had severe and catastrophic consequences for Mr. Banks's personality development. Such experiences produce memory problems because the mind tends to deal with otherwise intolerable psychological pain by isolating, or fragmenting, the experience that caused the pain.

14. Mr. Banks experienced a number of striking traumas as a child, all of which are likely to have had destructive consequences for his emotional and psychological development. For example, he accidentally burned down the family home at age five, leaving him with lifelong feelings of severe survival guilt. He was also beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped. These experiences alone would be enough to account for a large part of Mr. Banks' psychological impairment but even they do not approach the effects he suffered by being severely hyperallergenic from birth.

15. From Mr. Banks' birth, he has suffered from a severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin. His physicians have been unable to treat his condition; it has had severe traumatic and permanent disabling effects in every area of his physical, emotional, cognitive, and psychological development. To take just one

example: Mr. Banks did not develop normal sleep patterns as an infant due to his condition; he slept only after exhaustion. His mother would put his hands in socks and pin the socks to his diaper to attempt to keep him from scratching himself in his sleep; yet he would rub his face on the pillow until it was raw and bleeding. It is likely that Mr. Banks' illness, compounding the trouble in his parents' marriage from his father's alcoholism, impaired the development of normal and supportive bonding relationships between Delma and his mother and father. These consequences are representative of the thoroughgoing effects of his illness that have pervaded Mr. Banks' life to date.

16. As a result of his condition, Mr. Banks suffered from chronic raw and bleeding skin and hives throughout childhood and adolescence. These largely untreated symptoms, in turn, led directly to childhood, adolescent, and adult (skin) disfigurement. They also had *catastrophic* consequences for Mr. Banks' emotional and psychological development. Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore. He understandably went to great lengths to hide himself from public view throughout life. For example, he has avoided going out in public; when doing so was unavoidable, Mr. Banks covered as much of his skin as possible. He routinely wore long sleeve shirts even in the summers (and wore them buttoned all, the way to the top), and refused to wear short pants as a child even when playing games. He was openly ridiculed by other children in his neighborhood school, and church; even his family sometimes teased him about his unavoidable condition. Because the other children shut Delma Jr. out, he did not play with them or develop friends in the normal fashion. His fears of rejection, confirmed by his classmates, only led to lower self-esteem.

17. Rejected by his peers and others in the community, Mr. Banks understandably developed an overwhelming need

for acceptance; at the same time, the absence of such acceptance created in him an intense survival guilt and low self-esteem, approaching self-hatred. Mr. Banks even exhibited suicidal ideation as a child, a tendency which has continued into adulthood. In addition, he developed (and continues to display) a constricted affect toward the depressive end of the spectrum; that is, his ability to experience and express feelings were "shut down," and he tends to experience life as frustrating and meaningless. Mr. Banks' anxiety and depressive reactions, in turn, appear actually to have aggravated the physiological intensity of his hyperallergenic reactions in a sort of vicious cycle.

18. Mr. Banks' low cognitive capacity only made it more difficult for him to deal positively with his physiological impairment. Because of his borderline mental retardation and learning disability, Mr. Banks lacked some of the most important resources that can help an individual surmount a medical handicap. When humans find words to express their pain, they may also find relief. Only since his incarceration has Mr. Banks begun to find those words and taken the very first steps toward understanding his painful and tragic experience. At the time of the offense, and at the time of trial, Mr. Banks was unable to find relief from his physical and psychological torment in such expression. Instead, he relied—as he had learned in childhood, and had continued to do as an adolescent—on the adaptive style he found least painful: making his needs subservient to others' at any cost. That is, Mr. Banks had learned to alleviate the pain of rejection and alienation by completely sublimating his own wants, desires, and needs to those of others, in an attempt to maintain human contact. In many situations, this meant being the "scapegoat"—taking the blame for the actions of a sibling or a classmate, in hopes, of being, treated kindly in return. Mr. Banks learned to be the "scapegoat" from infancy to the present, and it is a pattern of thought and behavior that is extremely ingrained in his psychological makeup.

19. In sum, it is my definite impression, based on objective measures of Mr. Banks' cognitive functioning, and a careful interpretive assessment of his psychological development and impairment, that at the time of his trial in 1980 this young man was incapable of understanding the full consequences of the legal decisions he was called upon to make. Mr. Banks' low intelligence, and its destructive consequences for his ability to process verbal information and express himself meaningfully in response, compounded by the stressful courtroom situation, make it extremely unlikely that he could have appreciated the alternatives presented to him or reasoned his way to a choice among them, particularly without simplified explanations. Moreover, as a result of the extraordinary skin disease which has haunted his entire life, Mr. Banks had spent years eagerly attempting to please others by "going along;" he was, in effect, programmed from childhood to defer to the advice and suggestions of others, not to assert his own interests. Any nods, smiles, and gestures only indicated Mr. Banks' strong desire to please those in authority at any cost, including abandoning the fight for his own life. Because his emotional and psychological development were distorted by the continuing experience of his illness, Mr. Banks never developed appropriate defense mechanisms, judgment or insight; he lacked the ability to predict the consequences of his actions and displayed a marked tendency toward self-destructive behavior.

20. At the same time, some of these features of Mr. Banks' psychological profile accurately would have predicted that he would prove a "safe," nonviolent inmate during his present incarceration. As noted above, Mr. Banks' cognitive impairment and learning disability make him safer in a highly structured environment, such as prison, because the possibilities of novel or unexpected challenges and stress—which can aggravate Mr. Hanks' particular limitations and cause him to react without thinking, perhaps even violently—are minimal there. In addition, Mr. Banks' empathic abilities are

high, and he demonstrates high morals. He is best described as a docile, obedient, and subservient person who is eager to please even those who incarcerate him. This surmise would have been obvious to any competent mental health professional evaluating Mr. Banks in 1980.

Further affiant sayeth not.

I, Gregorio Pina, III, have read the foregoing affidavit. The matters asserted in this statement are true and correct to the best of my knowledge and belief, and I so state under the pains and penalties of perjury.

/s/ Gregorio Pina, III
GREGORIO PINA, III, Ph.D.

Signed and sworn in my presence this 22nd day of February, 1993.

/s/ Laura Pitchford
Notary Public, State of Texas
My Commission expires:_____

STATEMENT OF ROBERT HARLAN

County of Travis)
) ss
State of Texas)

1. My name is Robert Harlan. I am over eighteen years of age. I am the owner of Harlan Motors, an auto mechanic shop located at 1805 East 6th Street, Austin, Texas. I have owned and run this shop for five years and have worked as a full time mechanic for eight years.

2. I have reviewed excerpts of testimony taken from the capital murder trial of Delma Banks, Jr., which took place in Bowie County, September 1980. The testimony I have read concerns the 1964 Ford Mustang owned by the murder victim. This consists of testimony given by Patricia Hicks, Patty Bungardt, Larry Whitehead, and pretrial testimony of Willie Huff. I also reviewed weather reports from the night of the incident, and discussed with an investigator other testimony indicating that the car was driven to Dallas the night of the crime. I have been asked by Mr. Banks' attorneys to comment as to the condition of the car at the time of the incident, based on the description of the car's condition in the reviewed testimony.

3. While the mechanical failure of the Mustang could be attributed to something as simple as a shorted battery, it is my experience that battery-charging problems most often involve the battery in addition to either the alternator or voltage regulator.

4. The jump-starts described by Hicks were accompanied by her recollection of Richard Whitehead attributing the problem to the "carburetor." Since the carburetor could have no influence on this problem, it is likely that Whitehead had actually blamed the problem on the *alternator*, and Hicks

remembered incorrectly. His attributing the problem to something that was not the battery alone directly suggests that either the alternator or regulator was not functioning properly.

5. Replacing a car battery by a mechanic with tools is generally flat-rated at one-half hour's labor. To replace the alternator and voltage regulator, for an experienced mechanic with tools, would involve two hours' labor. In the likely circumstance that something in addition to the battery was to blame for the mechanical failure, it is doubtful that the car could have been driven from Texarkana to Dallas (approximately 3 hours) by simply replacing the battery. A weak charging system would not allow both the lights and windshield wipers to be operated over roughly one hour, even on a new battery. It is inconceivable that the car could have gone from Texarkana to Dallas, and then be driven for two days in Dallas, without making the necessary repairs.

I have read the foregoing affidavit, and it is true and correct to the best of my knowledge and belief. I so state under the pains and penalties of perjury.

/s/ Robert Harlan
ROBERT HARLAN

Signed and sworn before me on this 12th day of January, 1992.

/s/ Robert C. Owen
Notary Public, State of Texas
My commission expires: 08-03-93

IN THE 102ND DISTRICT COURT OF BOWIE COUNTY
NEW BOSTON, TEXAS

[Filed Apr. 1,1992]

No. ___

EX PARTE: DELMA BANKS, JR.

MOTION FOR DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and moves this honorable Court to grant discovery, as detailed specifically *infra*, in the above-styled matter. In support of which, Movant would show:

I.

INTRODUCTION AND COURSE OF PRIOR PROCEEDINGS

Defendant was convicted of capital murder in the 102nd District Court of Bowie County, Texas, on September 30, 1980, and was assessed the death penalty on October 1, 1980. His conviction and sentence were affirmed on direct appeal. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1983). The Supreme Court denied *certiorari*. *Banks v. Texas*, 464 U.S. 904 (1983). Mr. Banks unsuccessfully sought postconviction relief under Tex. Code Crim. Proc. Art. 11.07. *See Ex Parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

By order of December 10, 1991, this Court set Mr. Banks' execution for January 15, 1992. Pursuant to Tex. Code Crim. Proc. Art. 1 Mr. Banks filed a verified application for post-conviction writ of habeas corpus on January 13, 1992. This application alleged, *inter alia*, that "the Bowie County

District Attorney's systematic and intentional practice of using peremptory strikes to exclude qualified black venirepersons from criminal trials, continued in the instant case, violated Mr. Banks' right to equal protection of the laws and denied him a fundamentally fair trial." *Id.* at 6. This Court modified Mr. Banks' execution date to March 15, 1992, and later to April 30, 1992. The State has not yet responded to Mr. Banks' verified application for post-conviction writ of habeas corpus.

II.

WHY THIS COURT SHOULD ORDER DISCOVERY

Mr. Banks' Application for Post-conviction Writ of Habeas Corpus raises profoundly disturbing questions about the quality of justice meted out in Bowie County in the years prior to, and immediately following, Mr. Banks' capital murder trial in 1980. Mr. Banks, an African-American man, was tried by an all-white jury for the robbery-murder of a white teenager. Mr. Banks has alleged that the District Attorney intentionally exercised peremptory challenges to remove qualified blacks from Mr. Banks' jury pool, solely on the basis of their race. Sworn testimony from local attorneys confirms that the District Attorney's actions in Mr. Banks' case were not unique, but were consistent with a pattern and practice of racial discrimination in jury selection in Bowie County, stretching back at least as far as 1965.

Mr. Banks seeks to demonstrate by direct evidence the systematic and intentional exclusion of black citizens from criminal jury service in Bowie County during the years preceding, and immediately following, his trial. In support of this constitutional challenge, Mr. Banks has already presented to this Court the affidavits of two respected members of the local bar, as well as an affidavit recounting a conversation with a former Bowie County District Attorney, who acknowledged that his office maintained a *de facto* policy of

striking qualified black venirepersons in criminal cases. *See* Exhibits L (Affidavit of Jim Davis, Esq.), G (Affidavit of Clyde E. Lee, Esq.), H (Affidavit of Lynn B. Lamberty), I (Affidavit of Robert C. Owen) to Application for Post-Conviction Writ of Habeas Corpus. With this Motion, Mr. Banks submits an additional affidavit, from Sherman A. Kusin, Esq., another longtime member of the Bowie County bar. *See* Appendix A (Affidavit of Sherman A. Kusin, Esq.). Like the other attorneys whose sworn statements are in the record before this Court, Mr. Kusin confirms from personal knowledge that "between 1965 and 1980," "it was the obvious practice of the [Bowie, County] District Attorney's office in criminal cases . . . to use peremptory strikes against otherwise qualified black jurors." Appendix A. Mr. Kusin's experience in the Bowie County courts is extensive; during the fifteen years in question, he estimates that he tried approximately one hundred and eighty (180) criminal cases to juries, including four (4) or five (5) murder cases. *Id.* In about sixty percent (60%) of those cases, Mr. Kusin recalls, the defendant was black; yet, "all-white juries . . . were overwhelmingly the rule." *Id.*

In addition, counsel here proffers that yet another Bowie County attorney, Tom Newman, Esq., would likewise attest that local prosecutors, before and at the time of Mr. Banks' trial, had an "unwritten rule" of routinely exercising their peremptory challenges to remove black persons from the jury. Mr. Newman, officed at 219 West Broad Street in Texarkana, recalls having tried between 10 and 15 felony cases between 1975 and 1985, and specifically recalls three trials of black defendants (two murder cases and one aggravated sexual abuse case) in which no black persons served on the jury.

The Bowie County bar calls this Court to action with one voice, and that one voice declares that intentional racial discrimination was an unvarying practice of the District Attorney's Office in selecting felony trial juries in the years

leading up to, and following, Mr. Banks' capital murder trial. By means of the discovery here sought, Mr. Banks can demonstrate the harsh reality of this pattern and practice, and its fatally prejudicial consequences for his conviction and death sentence.

III.

INFORMATION SOUGHT TO BE DISCOVERED

Documents in the exclusive possession of the Bowie County District Attorney's Office will corroborate Mr. Banks' allegation of intentional racial discrimination in jury selection. The most important of such documents include the jury selection sheets and juror information sheets from all felony jury trials between 1965 (the earliest year concerning which Mr. Banks has presented sworn testimony concerning racial discrimination in jury selection in Bowie County) and 1982. According to sworn testimony presented by Mr. Banks, *see* Exhibits H, I, G, and L to Application for Post-Conviction Writ of Habeas Corpus, at least some of these documents contain notations of the race of prospective black jurors, a strong *prima facie* indicator of intent to discriminate on that basis. Mr. Banks requests that this Court allow him to inspect and copy such documents so that he may append them to his Application for Post-Conviction Writ of Habeas Corpus in support of his claim under *Swain v. Alabama*, 380 U.S. 202 (1965).

Other documentary evidence in support of this claim, also in the exclusive possession of the Bowie County District Attorney's Office, would include any memoranda, monographs, policy statements, or training materials circulated among and/or used by attorneys in the District Attorney's Office with respect to jury selection criteria in felony cases. Mr. Banks likewise requests to inspect and copy any such documents.

In addition, any memoranda or policy statements of the Bowie County Jury Commissioners, when that body was in existence, or any minutes of meetings thereof, or correspondence thereof with the District Attorney's Office, concerning criteria for drawing and assembling the county jury venire, could support the inference of intentional racial discrimination that is necessary to Mr. Banks' claim. *See Amadeo v. Zant*, 486 U.S. 214 (1988). Mr. Banks requests to inspect and copy any such documents.

IV.

THIS COURT'S AUTHORITY TO ORDER DISCOVERY

It is essential that Mr. Banks obtain the requested evidence through discovery since he has no other means of obtaining it. To deny the relief requested in this motion would be to deny Mr. Banks the opportunity for a full and fair hearing on his constitutional claims in this Court.

This Court's authority to grant the discovery requested is grounded in several sources. First, in connection with applications for post-conviction writs of habeas corpus, Article 11.07 of the Texas Code of Criminal Procedure requires this Court to determine the legality of the applicant's confinement and to resolve all issues of fact material to the legality of the applicant's confinement. In order to perform this task, Article 11.07 authorizes this Court, among other things, to "order affidavits, depositions, interrogatories, and hearings" as well as "any other matters" the Court deems appropriate. See Article 11.07, Sections 2 (c) & (d).

Second, Section 21.001(a) of the Texas Government code further expressly grants this Court "all powers necessary for the exercise of its jurisdiction . . ., including the authority to issue the writs and orders necessary or proper in aid of its jurisdiction." Because Article 11 of the Texas Code of Criminal Procedure expressly vests this Court with jurisdiction to entertain Mr. Banks's application for a writ of

habeas corpus, Section 21.001(a) of the Texas Government Code grants this court full power to exercise the jurisdiction and to perform the functions entrusted to it by the Texas legislature.

Third, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitle Mr. Banks to the discovery requested here. The United States Supreme Court repeatedly has held the "opportunity to be allowed to substantiate a claim before it is rejected" is a basic and essential ingredient of due process. *Ford v. Wainwright*, 477 U.S. 399, 414 (1986). As explained above, the discovery requested here is essential for Mr. Banks to substantiate his claims. In capital proceedings, moreover, the Eighth Amendment demands that factfinding procedures meet a heightened standard of reliability. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Spaziano v. Florida*, 468 U.S. 447, 456 (1984). "This especial concern is a natural consequence of knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford*, 477 U.S. at 411.

Finally, there are practical reasons to grant the discovery requested in this motion. Federal law provides that findings of fact in state habeas corpus proceedings shall not be entitled to any presumption of correctness or validity where, among other things, the state proceedings were not full, fair, and adequate. *See* 28 U.S.C. 2254 (d); *Townsend v. Sain*, 372 U.S. 293 (1963). Applying this statutory command, the federal courts have extended no deference or weight to state court habeas determinations where state courts or state law have restricted the petitioner's ability to gather evidence needed to present their claims to the state court. *See Moore v. Kemp*, 809 F.2d 702, 730 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987); *Marble v. Edwards*, 457 F.2d 759 (5th Cir. 1972). Failure to grant the discovery requested thus raises the possibility that this court's findings and conclusions may not

be afforded deference in subsequent proceedings. This Court should grant Mr. Banks discovery to ensure that the findings it ultimately enters are adequately supported by a factual record compiled in a fair manner, consistent with the demands of due process and the extraordinary stakes in the present litigation—Delma Banks' life.

V. CONCLUSION AND PRAYER FOR RELIEF

Mr. Banks' discovery request is narrowly tailored to require disclosure of only that information necessary to the proof of his claim under *Swain*. He has presented substantial direct proof of racial discrimination in jury selection through the attorney affidavits submitted with his original Application of January 13 and the additional affidavit and proffer presented with this Motion. Most important, this Court is aware that the interest of our system of justice in eradicating the vestiges of institutionalized racial discrimination from criminal trials, particularly in capital cases, is paramount. This Court should allow Mr. Banks the discovery necessary to prove his claim outright.

WHEREFORE, Applicant Delma Banks, Jr., prays that this Honorable Court:

1. Allow him to be heard by counsel on the matters contained in the present motion, and to present testimony in support thereof;
2. Grant him the limited discovery specified in this Motion,
3. Grant such other relief as law and justice require.

Respectfully submitted,

/s/ Clifton L. Holmes
CLIFTON L. HOLMES
Attorney at law
P.O. Drawer 3267
Longview, Texas 75601
903-758-2200

ATTORNEY FOR
DELMA BANKS, JR.

APPENDIX A

State of Texas)
Bowie County)

AFFIDAVIT OF SHERMAN A. KUSIN

Before me, the undersigned authority, appeared Sherman A. Kusin, who upon his oath deposes and says that the following is true and correct:

1. My name is Sherman A. Kusin. I am an attorney licensed to practice in the States of Texas and Arkansas, and maintain an office at 2501 Summerhill Road in Texarkana, Texas. I have been a member of the Texas bar since 1965. I am over eighteen years of age and am otherwise competent to make this statement.

2. In the course of my practice, I have tried many criminal cases to juries in Bowie County, Texas. Although I cannot state exactly how many such cases I tried between 1965 and 1980, I tried criminal cases to a jury on an average of once per month during that 15 year period. I tried four or five murder cases in Bowie County during that time. In approximately 60% of all the criminal cases I tried, my client, the defendant, was black.

3. During that era, it was the obvious practice of the District Attorney's office in criminal cases in which I participated in Bowie County to use peremptory strikes against otherwise qualified black prospective jurors. As a result, all-white juries in my criminal cases in Bowie County were overwhelmingly the rule. I cannot remember trying a murder case in Bowie County in which a black person was allowed to sit on the jury. Every otherwise qualified black venireperson was stricken by the State through the use of peremptory challenges.

4. In the criminal cases in which I was involved, far less than 22% of the pool of venirepersons from which the jury was selected were black. This was due to the fact that jurors in Texas were selected from real property rolls during the period from 1965 through 1980 and few blacks were real property owners. I am confident, based upon my conversations with other attorneys in Bowie County, that my experience is representative of that of other lawyers here, at least during the period 1965 through 1980. The district attorney using peremptory challenges to strike black jurors and the underrepresentation of blacks in the jury pool for criminal trials was simply the way things were done in the criminal justice system in Bowie County and was the accepted practice during that time.

Further affiant sayeth not.

I have read the foregoing affidavit and affirm that it is true and correct, and I so state under the pains and penalties of perjury.

/s/ Sherman A Kusin
SHERMAN A KUSIN

Sworn and signed before me this
10th day of March, 1992.

/s/ Jackie Smith
JACKIE SMITH
Notary Public, State of Texas
(ss).

[Certificate of Service Omitted in Printing]

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY NEW BOSTON, TEXAS

No. ___

EX PARTE: DELMA BANKS, JR.

ORDER

ON APPLICANT'S MOTION FOR DISCOVERY

Applicant's Motion for Discovery is hereby GRANTED. Counsel for Applicant is ordered to arrange with Counsel for Respondent, within a reasonable period, a mutually convenient time for the inspection and, if necessary, copying of the documents described in Applicant's Motion for Discovery.

Signed and entered this__ day of_____,1992.

_____
Judge Presiding
102nd Judicial District Court

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY AT NEW BOSTON, TEXAS
and
IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

[Filed Oct. 1, 1992]

No. ___
(Bowie County No. 80-F-86)

EX PARTE: DELMA BANKS, JR.

MOTION FOR INVESTIGATIVE AND
AND COURT ANALYST FUNDS

Mr. Banks is scheduled to be executed
FRIDAY, OCTOBER 30, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURTS:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and files this Motion for funds, in support of which, he pleads the following:

1. Mr. Banks has this day moved the Court to compel discovery and compliance with the Texas Open Records Act. When and if this Motion is granted, Mr. Banks will be in dire need of funds for investigative assistance in going through those records. Moreover, he will need a court records analyst to help analyze the data that is found. In the event that the Motion for discovery and compliance is not granted, Mr.

Banks will still be in need of investigative assistance in determining the race of those persons on the venire sheets listed in Exhibit 3 of his Second Supplemental Application. In addition to this assistance, Mr. Banks needs the aid of an investigator in order to develop fully his allegation that the Bowie County District Attorney's office had not disclosed that a favorable deal had been arranged for Charles "Two Two" Cook, the State's chief witness, in exchange for his testimony against Mr. Banks.

2. In further support of the need for investigative funds, Mr. Banks reasserts the facts and points of law detailed in paragraphs 1-5 and 7-14 of the original Application, and in his Supplemental Applications.

For these reasons, Mr. Banks respectfully requests that his Motion be granted, and an accompanying draft Order is attached.

Respectfully Submitted,

/s/ Clifton L. Holmes
(with Expressed Consent)
CLIFTON L. HOLMES
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601

Attorney for Delma Banks, Jr.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by hand on counsel for the prosecution:

Office of the District Attorney
Bowie County
Bowie County Courthouse
New Boston, Texas

Done this 1st day of October, 1992.

/s/ Steven Hawkins
STEVEN HAWKINS

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY AT NEW BOSTON, TEXAS

and

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

No. ___
(Bowie County No. 80-F-86)

EX PARTE; DELMA BANKS, JR.

ORDER

The Movant, Delma Banks, is a Texas death raw inmate who is scheduled to be executed October 30, 1992. He has filed in this Court an Application for habeas relief.

On October 1, 1992, the Movant moved in this Court for funds to hire an investigator and a data analyst in order to more fully factually develop his claims to relief under *Swain v. Alabama*, 380 U.S. 202 (1965) and *Giglio v. United States*, 405 U.S. 150 (1972).

The Court finds that these claims are factually intensive enough that the requested funds are necessary for the full and fair development of the Movant's claims. The Movant's *Swain* claim carries a high evidentiary burden, and his *Giglio* claim requires investigation into facts and circumstances that occurred over a decade ago. Both claims would clearly entitle the Movant to habeas relief if proved meritorious.

THEREFORE, it is Ordered that petitioner is entitled to the reasonable expenditure of funds for investigative assistance and for hiring a data analyst.

DISTRICT JUDGE

IN THE 102ND DISTRICT COURT OF BOWIE COUNTY
AT NEW BOSTON, TEXAS

and

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

[Filed Oct. 1, 1992]

No.___
(Bowie County No. 80-F-86)

EX PARTE DELMA BANKS, JR.

MOTION TO COMPEL DISCOVERY AND
COMPLIANCE WITH THE TEXAS
OPEN RECORDS ACT

Mr. Banks is scheduled to be executed
FRIDAY, OCTOBER 30, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURTS:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and files this Motion to Compel Discovery and Compliance with the Texas Open Records Act. In support of which, he pleads the following:

1. Mr. Banks realleges the facts and points of law as set forth in his Application and Supplements in support of his claim for habeas relief under *Swain v. Alabama*, 380 U.S. 202 (1965) and Article 1, Section 3, of the Texas Constitution.

2. In order to prove his *Swain* claim, Mr. Banks requests that the Court compel compliance with his Motion for

Discovery filed March 30, 1992. Moreover, Mr. Banks requests that the Court compel the Bowie County District Attorney's Office to comply with Mr. Banks' request for access to closed case files under the Texas Open Records Act.[1] *Texas Code*, Tit. 110A, Art. 6265-17a.

3. Mr. Banks specifically seeks access to the District Attorney's strike sheets for those cases listed under Exhibit 3 in his Second Supplemental Application. In addition, Mr. Banks seeks access to any data, notes, files or any other information in the District Attorney's Office that may concern or discuss the race of those persons on the strike sheets and the venire as a whole. Such information is needed in order for Mr. Banks to be able to have a full, fair and adequate development of his *Swain* claim in this Court.

For these reasons, Mr. Banks respectfully requests that his Motion be granted, and an accompanying draft Order is attached.

Respectfully Submitted,

/s/ Clifton L. Holmes
(with Expressed Consent)
CLIFTON L. HOLMES
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601

Attorney for Delma Banks, Jr.

---

[1] On Monday, September 28, 1992, the Bowie County District Attorney's Office denied Mr. Banks' request for access to closed case files pursuant to the Texas Open Records Act. *See* Exhibit A.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by hand on counsel for the prosecution:

Office of the District Attorney
Bowie County
Bowie County Courthouse
New Boston, Texas

Done this 1st day of October, 1992.

/s/ Steven Hawkins
STEVEN HAWKINS

APPENDIX A

September 28, 1992

Office of the District Attorney,
Bowie County
New Boston, Texas

To Whom It May Concern,

In accordance with the Federal Freedom of Information Act and the Texas Open Records Act, I am writing to review and copy portions of felony trial files maintained by the Bowie County District Attorney's Office. Specifically, I request an opportunity to review certain files created by District Attorneys Lynn Cooksey and Louis Rafaelli, and any Assistant District Attorneys working with them, from the years 1975 through 1981. All such files pertain to cases in which appeals have been exhausted.

The Texas Open Records Act holds that legal records maintained by the state become open to review after a case has exhausted its appeals.

This request is being made in connection with an immanently pending legal matter. I am an investigator assisting an attorney who has directed me, in order for his client to receive a full and fair review of his case, to write this letter of request.

Sincerely,

/s/ Tom McNeely
TOM MCNEELY
Investigator

IN THE 102ND JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

[Filed Oct.6, 1992]

No. 80-F-86-102-C

EX PARTE DELMA BANKS,
Applicant

RESPONDENT'S ORIGINAL ANSWER

Respondent, the State of Texas, by and through its District Attorney for the 102nd Judicial District of Texas, files this its original answer in the above-captioned cause, having been served with an application pursuant to the requirements of Tex. Code Crim. Proc. Ann. Art. 11.07, Sect. 2, and would respectfully show unto the Court the following:

I.

Applicant is confined pursuant to a judgment and sentence for the offense of capital murder in Cause Number 80-F-86, wherein Applicant was convicted by a jury in the 102nd Judicial District Court of Bowie County, Texas. On October 1, 1980, Applicant was sentenced to death by lethal injection. The conviction was appealed to the Court of Criminal Appeals and the trial Court's judgment of conviction was affirmed by Opinion No. 68,933, dated November 3, 1982. Writ of Certiorari was sought in the United States Supreme Court and was denied in Opinion No. 82-6498, dated October 11, 1983.

* * * *

XVII. THE ADMISSION OF EVIDENCE OF UNADJUDICATED EXTRANEOUS OFFENSES AT THE PENALTY PHASE OF MR. BANKS' TRIAL DEPRIVED HIM OF PROBATIVES GUARANTEED BY THE CONSTITUTION.

III.

Respondent denies each and every allegation of fact made by Applicant, except those supported by official court records and those specifically admitted herein and offers the following additional reply:

REPLY TO GROUND FOR RELIEF I

(THE STATE FAILED TO REVEAL SECRET AGREEMENTS WITH ITS KEY WITNESS.)

Applicant contends the State failed to reveal a secret agreement with a witness. This contention rests upon two false assertions. First, there was no agreement; second, nothing was kept secret from the defense. The Trial record reveals defense counsel was knowledgeable of all wrongdoing that could possibly be attributible to Charles Cook and the absence of any agreement. (S.F. Vol VIII, 2148-2154). Part of the defense strategy at trial included insinuating before the jury that Cook was testifying pursuant to some sort of plea bargain arrangement.

Additionally, Cook was never a suspect in the murder of Richard Whitehead. Law enforcement officials never contemplated filing criminal charges against Cook.

In sum, there was no deal with Cook, nor was Cook a suspect in the murder. (See Exhibits, Affidavits IA-IC). Applicant's contention is without any factual basis and has no support whatsoever in the record.

* * * *

REPLY TO GROUND FOR RELIEF III

(COUNSEL FAILED TO PROVIDE MR. BANKS EFFECTIVE ASSISTANCE THROUGHOUT ALL STAGES OF THE PRE-TRIAL, VOIR DIRE AND TRIAL PROCEEDINGS.)

(COUNSEL FAILED TO INVESTIGATE MATTERS RELEVANT TO BOTH GUILT/INNOCENCE AND PUNISHMENT PHASES OF TRIAL.)

(DEFICIENCIES IN TRIAL COUNSEL'S PERFORMANCE IN PRE-TRIAL PROCEEDINGS AND JURY SELECTIONS.)

(DEFICIENT TRIAL PERFORMANCE.)

Applicant claims that he received ineffective assistance of counsel at trial and on appeal, in violation of the Sixth and Fourteenth Amendments and Article I, section 10 of the Texas Constitution.

It is now well established that claims of ineffective assistance of counsel are to be reviewed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Burger v. Kemp*, 107 S.Ct. 3110 (1987); *Darden v. Wainwright*, 106 S.Ct. 2465 (1986). The *Strickland* standard has specifically been adopted by the Court of Criminal Appeals in reviewing claims of ineffective assistance of counsel under state law. *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986). To meet this standard, a criminal defendant must demonstrate:

> First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, 104 S.Ct. at 2065, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* 104 S.Ct. at 2066. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.*

To demonstrate prejudice the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. When a defendant challenges the death sentence, the question is "whether there is a reasonable probability that, absent the errors, the sentence—including the appellate court, to the extent it independently re-weighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069.

It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, 106 S.Ct. 366, 371 (1986); *Manning v. Blackburn*, 786 F.2d 710, 712 (5th Cir. 1986). Absent such pleading, a habeas petitioner is not entitled to a federal evidentiary hearing on his claim. *Id.* The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is not necessary that the court address the other. *Strickland*, 406 U.S. at 697,104 S.Ct. at 2069-70.

Applicant contends that witnesses who could have presented mitigating evidence at the punishment phase were not called to do so. He further asserts that his trial counsel, Lynn Cooksey, failed to adequately prepare for the sentencing hearing.

In Texas, the Adequacy of counsel's representation at the punishment phase is governed by the test enunciated in *Boyd v. State*: "The Strickland test is the proper standard to gauge the effectiveness of counsel at the guilt/innocence phase of a non-capital trial and at the guilt/innocence and punishment phases of a capital murder trial." *Craig v. State*, No. 333-90 (Tex.Crim.App. March 4, 1992), *citing Boyd v. State*, 811 S.W.2d 105, 109 (Tex.Crim.App. 1991).

When the Strickland standard is applied to the instant case, counsel is shown to have rendered effective representation.

A review of the appellate record shows that counsel's investigation was not lacking. Counsel was familiar with the facts of the case and when appropriate conducted vigorous cross-examination and voir dire of the witnesses. *Rosales v. State*, No. 69,576, slip op. at 11 (Tex.Crim.App. April 15, 1992). Not every failure to present, or even fully investigate mitigating evidence constitutes a deficiency in representation. The record provides an insufficient basis for Applicant's claim for ineffectiveness. *See Ex parte Williams*, 634 S.W.2d 815, 819 (Tex.Crim.App. 1980), *cert denied* 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982) (allegations of ineffective assistance will be sustained only if firmly founded and affirmatively demonstrated by the record).

Although the applicant implies that counsel failed to talk with and present the testimony of Witnesses, the applicant fails to name any specific available witness and to state how the testimony would have been beneficial to the Applicant. *King v. State*, 649 S.W.2d 42 (Tex.Crim.App. 1983) (failure to call witnesses does not constitute ineffective assistance of

counsel unless accused shows that the particular witnesses were available and their testimony would have benefitted the accused.)

Nevertheless, the "totality of representation" afforded the Applicant in the instant case was beyond reproach. At all times Cooksey was fully prepared for the sentencing hearing, despite allegations to the contrary. He began preparation of his punishment phase file well in advance of the actual sentencing date. Cooksey affidavit.

Responding to the allegation that Cooksey failed to present mitigating evidence from available witnesses, he stated that "after both myself and investigator Dennis Waters interviewed Mr. Banks, it was clear to us that we had all the available evidence which could even remotely be considered 'mitigating' in nature." Cooksey affidavit. Cooksey and investigator Dennis Waters investigated the case for mitigation fully cognizant of all applicable rules. The only mitigating evidence which existed was that of Applicant's character, which was fully addressed by the second special issue. Accordingly, testimony as to Applicant's good character was represented at the punishment phase of trial through the testimony of seven witnesses. Applicant's complaint that even more witnesses should have been called as to testify as to his good character is unjustified. Applicant does not demonstrate, nor do the affidavits attached to his application reflect that the testimony such witnesses would have given would not have been repetitive or duplicitous of that already presented. It is well settled that counsel is not ineffective for failure to call witnesses at either stage of the prosecution, absent a showing that (1) such witnesses were available and (2) that Applicant would have benefited from their testimony. *Byars v. State*, 691 S.W.2d 48, 54 (Tex.Crim.App. 1985); *King v. State*, 649 S.W.2d 42, 44 (Tex.Crim.App. 1983). Applicant fails to establish how repetitious testimony from dozens of witnesses who were acquainted with Applicant

could have possibly persuaded the jury that a lesser sentence was in order for a man who had already been found guilty of an execution-style slaying. For counsel to choose to present his most credible witnesses and minimize repetition is clearly reasonable under the facts of this case. The decisions included whether or not Applicant should testify and who should be called as a witness both at guilt/innocence and punishment. Applicant cannot now be heard to complain in this regard. The fact that another attorney might have pursued a different strategy will not support a finding of ineffectiveness of counsel. *Passmore v. State*, 617 S.W.2d 682, 686. (TexCrim.App. 1978).

Gauging the totality of representation afforded Applicant by Cooksey, his allegations that counsel was ineffective at the punishment phase dissolve in the absence of a showing of errors which would entitle Applicant to relief. Counsel cannot be held ineffective for failure to advance grounds which have no merit; and Applicant is not entitled to relief where he cannot demonstrate error in counsel's performance.

Applicant also alleges his appellate counsel was ineffective because counsel failed to raise a claim of ineffective assistance of counsel at trial, and sufficiency of evidence of future dangerousness that should have been raised on appeal. A defendant does not have any right to compel court appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Applicant's appellate counsel, obviously exercising his reasonable professional judgment, presented numerous non-frivolous claims on appeal, including several claims Applicant feels warrant habeas relief. Any claim of ineffective assistance of counsel is simply not reflected in the record. Applicant has not met the first prong of the *Strickland* test. Even assuming arguendo, that Applicant's appellate counsel was deficient,

Applicant does not even attempt, and would be unable to demonstrate, prejudice arising from the alleged omissions, thus failing to satisfy the second prong of Strickland. Applicant's claim thus fails.

* * * *

REPLY TO GROUND FOR RELIEF IX

(THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT WHICH DENIED MR. BANKS A FAIR TRIAL.)

Applicant makes a blanket complaint of prosecutorial misconduct throughout the trial. The points listed under this ground for relief fall into two categories. Either they are covered in other replies in this answer or they are procedurally barred because no contemporaneous objection was made at time of trial.

The issue of improper jury selection was covered in Ground V. The issue of a "secret agreement' with a State's witness was covered in Ground I.

The remainder of the points under this ground should be procedurally barred based on the absence of a contemporaneous objection at trial. *Ex Parte Dutchover*, 779 S.W.2d 76 (Tex.Crim.App. 1989); *Ex Parte Banks*, 769 S.W.2d 539 (Tex.Crim.App. 1989); *Ex Parte Russell*, 738 S.W.2d 644 (Tex.Crim.App.1986).

Nothing under this ground for relief should entitle Applicant to relief.

* * * *

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF WILLIE HUFF

1. My name is Willie Huff. I am over eighteen years of age and fully competent to make this affidavit. In February 1973 I was employed by the Bowie County Sheriff's Department as a criminal investigator; I served in that capacity until December 1981. I was the case officer in the capital murder case against Delma Banks. I was the officer who took the initial call, investigated the case, testified at trial and assisted with the security arrangements for Delma Banks during his trial.

2. Charles Cook was never a suspect in the murder of Richard Whitehead.

3. There was no deal, secret or otherwise, with Charles Cook.

/s/ Willie Huff
WILLIE HUFF

Sworn and subscribed to before me this 12th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

My Commission Expires:
5-28-95

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF JAMES ELLIOTT

1. My name is James Elliott. I am over the age of eighteen and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I became an Assistant District Attorney for Bowie County on January 22, 1979. I was co-counsel in the capital murder case of the State of Texas vs. Delma Banks.

2. I am aware of all facts concerning the investigation and prosecution of Delma Banks.

3. There was no secret agreement with Charles Cook in exchange for his testimony.

4. I am unaware Charles Cook was ever considered a suspect in the murder of Richard Whitehead.

/s/ James Elliott
JAMES ELLIOTT

Sworn and subscribed to before me this 12th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

My Commission Expires:
May 28,1995

THE STATE OF TEXAS)
COUNTY OF TARRANT)

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day, personally appeared KEVIN A. BYRNE, who being duly sworn; deposed as follows:

"My name is Kevin A. Byrne. I am over the age of eighteen (18) and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I was an Assistant District Attorney in Dallas County, Texas, in June of 1981. I was apparently the prosecuting attorney on the case styled *State of Texas v. Charles Edward Cook*, Cause No. F81-2140-P. I have no recollection whatsoever of any pre-arranged plea bargain with Mr. Cook, wherein a 'deal' was cut with Mr. Cook in exchange for his testimony in the case styled *State of Texas v. Delma Banks*."

/s/ Kevin A. Byrne
KEVIN A. BYRNE

SUBSCRIBED AND SWORN TO BEFORE ME on this 12th day of May, 1992.

/s/ Christi L. Dyson
CHRISTI L. DYSON
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires:

Exhibit A

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF DENNIS WATERS

1. My name is Dennis Waters. I am over the age of eighteen and fully competent to make this affidavit. I am currently a licensed private investigator. I began my career in law enforcement in 1969 working for Texas Department of Public Safety. I held that position til 1975. From approximately 1975 to 1977 I served in the position of appointed constable in Bowie County, Texas. I have also served as a law enforcement officer for Hooks and Nash. I have held the position as city judge for Nash.

2. I was employed as private investigator for Mr. Lynn Cooksey in the capital murder case of the State of Texas vs. Delma Banks. I interviewed Delma Banks several times prior to his trial. He was extremely uncooperative. When asked about the facts of this case he would simply tell me he hitchhiked from Nash to Dallas in one hour and fifteen minutes in the rain. When told this was physically impossible he stated, "The Lord will take care of me." At one point he agreed to submit to a polygraph test pursuant to an agreement between the State and the defense. When told his mother could not be present, he refused the test.

3. At no time did Delma Banks appear to be brain damaged or impaired in any way he appeared to understand the questions asked of him and was aware of the importance of his answers when he chose to give answers.

4. As investigator, I visited the crime scene and made photographs with Mr. Cooksey. I interviewed many of the State's witnesses and did background investigations of them.

5. I also secured and interviewed witnesses who agreed to testify on Mr. Banks behalf at trial. I was not told of any rash

or allergy by Delma Banks or any member of his family. The only evidence I found that could possibly be used on his behalf were the character witnesses. These witnesses were interviewed at Demetra Banks home and at law office of Lynn Cooksey.

/s/ Dennis Waters
DENNIS WATERS

Sworn and subscribed to before me this 13th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF LYNN COOKSEY

1. My name is Lynn Cooksey. I am over the age of eighteen and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I received my law license in 1967. From 1967-1978 I served as the District Attorney of Bowie County, Texas.

2. The decisions made and actions taken on behalf of Delma Banks were the result of my professional judgment. My presentation of Delma Banks' defense was based on the trial strategy I chose to put forward on his behalf.

3. It did not appear to me that Delma Banks suffered from any brain damage or mental impairment whatsoever. He understood the questions asked and gave appropriate answers. I did not recommend any type of psychiatric exam because I perceived nothing that would indicate such was needed.

4. No mention was made of any rash or allergy that would account for or in any way affect the behavior of Delma Banks. At trial I brought these witnesses forwarded in such numbers and in a fashion I believed would most help Delma Banks. I believe the record would reflect I consulted with my client on these matters.

5. I specifically deny the allegations of professional misconduct which have been leveled against me. In particular, I did not attempt to persuade Mrs. Banks to testify falsely concerning the whereabouts of her son on the night of the murder of Richard Whitehead.

/s/ Lynn Cooksey
LYNN COOKSEY

SWORN AND SUBSCRIBED TO BEFORE ME, this the 30th day of December, 1992.

/s/ Becky A. Schobey
BECKY A. SCHOBEY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Mar. 7, 1996]

No. 6:96cv220

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
THIS IS A CAPITAL CASE
Mr. Banks is scheduled to be executed
Friday, MARCH 15, 1996

Clifton L. Holmes
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601
903/758-2200

Elaine R. Jones
Theodore M. Shaw
George H. Kendall
L. Song Richardson
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
Suite 1600
New York, New York 10013
(212) 219-1900

ATTORNEYS FOR PETITIONER
DELMA BANKS, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

No. ___

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

THIS IS A CAPITAL CASE
Mr. Banks is scheduled to be executed
Tuesday, MARCH 15, 1996

DELMA BANKS, Jr., an indigent prisoner confined on death row in the Texas Department of Criminal Justice, Institutional Division, by and through counsel, petitions this Honorable Court for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 *et seq.*

* * * *

My vote for the imposition of a death sentence in this case stemmed directly from my religious convictions. Foremost in my mind during deliberation, was a particular Old Testament passage in which God warns the children of Israel about polluting themselves by associating with people of other persuasions. God specifically calls for the execution of one man who takes

for himself a woman of a neighboring community. This biblical passage convinced me of the necessity of the death penalty in Delma Banks' case.

HPr. Exhibit S. Given that Mr. Banks had befriended the white youth he was convicted of killing, the import of Ms. Wyant's statement is clear. She sentenced Mr. Banks to death based on her belief that racial inter-mixing — "associating with people of other persuasions" — must be punished by death.[4]

96. Additionally, during the jury's delibrations at the sentencing phase of Mr. Banks' trial, the jurors decided that Mr. Banks would be paroled and would likely commit armed robberies if released. HPr. Exhibit P & Q. Based upon the belief that such parole would in fact occur, at least one juror decided to vote for a death sentence rather than a life sentence. *Id.*

III. RESPECTS IN WHICH MR. BANKS' RIGHTS HAVE BEEN VIOLATED

97. Mr. Banks has been convicted and sentenced to death in violation of the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in the following respects:

A. *Ineffective Assistance of Counsel at Trial*

98. Trial counsel's numerous errors and omissions at both phases of the capital trial denied Mr. Banks his Sixth and Fourteenth Amendment rights to effective assistance of counsel. These errors and omissions, singly and collectively, resulted in representation well below that required by

[4] In the state post-conviction hearing, Ms. Wyant did not deny the fact that she made this statement. She claimed only that she was duped into making it. But as the document itself shows, Ms. Wyant initialed the statement, read it thoroughly, and even added an additional statement.

contitutional standards and actual prejudice to Mr. Banks at each phase of his trial. Counsel's errors and omissions include, but are not limited to, the following:

Pre-Trial Phase

99. Trial counsel failed to make sufficient preparation for trial in a number of key respects.

100. Counsel failed to conduct a constitutionally adequate investigation into both the state's case against Mr. Banks and possible defenses that could be asserted on Mr. Banks' behalf. This lack of investigation left the defense woefully unprepared to confront the state's case against Mr. Banks, and to assert a defense on his behalf.

101. Though retained soon after Mr. Banks was arrested, Mr. Cooksey failed to use the months before trial to pursue the most basic investigation. He did not visit the park where the body of the deceased was found, and thus had no idea what the area looked like. Tr. 2003-4. The park lay less than five miles from Cooksey's office. Because he had never bothered to make that five-minute drive, Cooksey was unable at trial to effectively cross-examine the State's witness who presented photographs of the scene. Cooksey complained that he was "surprised" by their introduction. *Id.*

102. Most of trial counsel's few motions were filed on August 15, 1980. Tr. 16-32. Virtually none of those motions were taken up by the court until September 22, 1980, the same day that jury selection started. Tr. 7. One of the motions decided at that time was a discovery motion. Tr. 24. Of course, with the beginning of the trial imminent, any information gained through the motion could not have been used meaningfully to develop or inform defense strategy. Trial counsel simply did not follow up on even his own motion for discovery to try to prepare for this case.

103. Counsel also failed to uncover facts that were essential to the successful prosecution of motions filed and heard pretrial. For example, despite extensive pretrial publicity, Mr. Cooksey offered no evidence, save Mr. Banks' testimony, regarding the extent of the publicity. Not one newspaper article or radio broadcast was placed into evidence. Mr. Banks was prejudiced by the absence of proof supporting this motion.

104. Counsel also failed to question prospective jurors about their exposure to pretrial publicity, and whether they had learned of, or formed opinions about, the alleged facts and circumstances of Mr. Banks' case.

105. Additionally, as described in paragraphs 100-103 *supra*, counsel failed to adequately investigate the case and follow up on leads that demonstrated that Mr. Banks may not have committed the murder. These and other omissions and errors left counsel wholly unprepared to begin trial on September 29, 1980.

Guilt Phase

106. Trial counsel's lack of readiness was evident from the beginning of the trial proceedings, and continued throughout. While knowing that the racial nature of the crime could weigh heavily on the minds of an all-white jury, counsel made no effort to insure that members of the African-American community were represented on the jury. In fact, when Mr. Banks told Mr. Cooksey that he wanted blacks on the jury, Mr. Cooksey wrote him a note acknowledging that the prosecutor would strike all blacks, and yet, inexplicably, failed to object to the state's practice.

107. Counsel neither acquainted himself with the facts the State would attempt to prove at the guilt phase, nor prepared to highlight the many inconsistencies and gaps in the State's case through cross-examination. Mr. Cooksey's cross-examination of key State's witnesses was not reasonably

adequate. For example, the state's "proof" on the important issue of the time and date of death was allowed to stand unimpeached because Mr. Cooksey cross-examined neither the medical examiner nor the witness who heard two sounds early in the morning with the autopsy report that showed a significantly different time of death. No reasonable tactical or strategic reason can explain counsel's utter failure to investigate, explore through cross-examination, or highlight in closing argument the disparity between the autopsy report's indication of the date of death and the allegations of the state.

108. Additionally, the facts of Mr. Banks' alleged admission of having committed the homicide, as recounted by Mr. Cook, varied significantly from the known and demonstrable facts, but defense counsel never brought these discrepancies to the jury's attention. Nor did counsel challenge the other parts of Cook's story that were ripe for cross-examination. For example, Cook never explained, because he was not asked, why he allowed a stranger he believed to have committed a murder to stay in his family's home.

109. Counsel also neglected to challenge the prosecutor's repeated and demonstrably false assertion that the facial gunshot wound to the deceased had been fired "right between the eyes." That description utterly misrepresented the facts as revealed in the autopsy report. Had counsel demonstrated otherwise, such a juror could have concluded that the physical evidence did not support a finding of cold-blooded "deliberateness."

110. Several times during voir dire, trial counsel told prospective jurors that if the defendant testified at a criminal trial, he waived the ability to challenge the sufficiency of the evidence to support the conviction. That was simply an incorrect statement of the law. In fact, the law at that time was

that if a defendant moved for a directed verdict of acquittal at the close of the State's case and then testified, he waived the right to challenge the court's denial of the motion.

111. While the jury's understanding of the law in this area may not have been dispositive, Mr. Cooksey's misunderstanding of it undoubtedly reflects the advice he likely gave to Mr. Banks about not testifying. Mr. Banks, who testified at the punishment phase of his trial, offered a credible explanation for his actions and said that he had not committed the murder. Such information would have certainly been relevant and quite significant for the jury to have when evaluating his guilt. The only reasonable explanation for Mr. Banks' not testifying is that his attorney made a mistake of law that determined the advice he gave his client; counsel's faulty advice interacted with Mr. Banks' mental deficit (*see infra*) to deprive Mr. Banks of his constitutionally guaranteed right to tell the jury what had happened on the night of the offense.

112. In addition, after carefully examining his client in the judge's chambers regarding his understanding of his right not to trestify, Mr. Cooksey then inexplicably emphasized that failure to the jury by announcing in open court that the defendant was not testifying on counsel's advice. Tr. 2259.

113. Counsel made no opening statement, giving up the opportunity to provide the jury with any defense theme. Furthermore, counsel failed to present any defense on Mr. Banks' behalf despite existence of inconsistencies and misrepresentations in the state's case. As demonstrated in paragraphs 106-109 above, many significant facts, which would have directly challenged the state's version of events, could have been offered. Finally, counsel's performance during the closing arguments was not effective. His closing argument fell below any professional standard of reasonableness. He also failed to object to numerous misstatements and improper arguments by the prosecution.

Penalty Phase

114. With respect to the penalty phase, moreover, counsel presented few potential mitigation witnesses, despite the availability of a substantial number. Counsel then compounded his failure by not bothering to prepare the handful of witnesses he actually placed on the stand. But for these omissions and errors, Mr. Banks would not have been sentenced to death.

115. Counsel failed to make any meaningful investigation of the state's evidence of future dangerousness. Although counsel was aware of the extenuating circumstances surrounding the state's insinuation that Mr. Banks "pistol-whipped" Vetrano Jefferson, he made no effort to present the evidence from Vetrano's sister which would have refuted the state's contention. Demetra Jefferson's account would have created a dramatically different impression of Mr. Banks than the jury actually received. Given Mr. Banks' youth and complete lack of any prior criminal record, and the extreme weakness of the state's case at punishment in any event, this error alone compels the conclusion that the outcome of the punishment phase would have been different if counsel had acted reasonably and called Demetra Jefferson to testify.

116. Despite his suspicions, which are apparent from the record, and the background facts which were available in a simple interview of Mr. Banks' family members, counsel did not ask to have Mr. Banks evaluated by any mental health professionals, nor did he seek expert assistance in understanding or describing Mr. Banks' limitations to the jury. Expert witnesses are critical in many capital cases. Without their assistance, the sentencing jury may be — as the jury unquestionably was in this case — deprived of a mitigating explanation for otherwise unexplainable behavior.

117. Counsel also failed to make any investigation for mitigating evidence to present as reasons to reject imposition

of a death sentence. Counsel took no social history from Mr. Banks or from his family and conducted no search for mitigating witnesses. Had counsel conducted such an investigation, they would have found an extraordinary array of factors and circumstances in Mr. Banks' past life that would have shown a sentence of death to be excessive punishment. Counsel had no strategic reason for not conducting or presenting such evidence. In fact, he even told Mr. Banks that it would be inadvisable for him to call all the mitigating witnesses that he did have. With his client's life on the line, trial counsel did not want to let the jury hear all of the people who were prepared to tell them that Mr. Banks should live. Worse, counsel did not know any of the people he called. They were only present in court because counsel had implored Mr. Bank's mother to call them late the previous night, after Delma had been convicted, and ask them to testify. Thus, Mr. Cooksey at that late date could neither fully investigate their potential testimony or use his expertise, such as it was, to determine how best to present it.

118. Even with respect to those defense witnesses who *did* testify, counsel's examination was inept and defeated the purpose of calling them. His examinations were very brief and did not begin to plumb the depths of the knowledge of Mr. Banks that these people, such as one of his teachers and his employer, should have had.

119. This failure alone shows a harmful violation of the right to effective assistance of counsel. Had even part of the mitigating evidence set out above been developed and effectively presented, no humane sentencer would have returned a verdict of death. Had the jury known of the tragedy that marked Mr. Banks' life, its view of the state's evidence would without question have been different, and its treatment of Mr. Banks more compassionate.

120. Counsel also failed to object to numerous improper and highly prejudicial remarks made by the prosecution during its closing argument at the penalty phase. The argument was a studied attempt to secure a death sentence by inflaming the jury with prejudicial considerations. The prosecutor made prejudicial remarks that the Bible and religion sanctioned and mandated the death penalty in this case. These and other offensive remarks were improper and harmful, and injected highly irrelevant considerations before the sentences. Counsel made no objection to any of them.

121. Trial counsel's final address to the jury was hopelessly ineffective. He spoke a mere seven minutes, during which he agreed with the state that Mr. Banks "did a terrible thing." Tr. 2414. His positive comments about Mr. Banks did not even cover all of the information given by the defense witnesses.

122. For these and other reasons apparent in the record, Mr. Banks failed to receive the effective assistance of counsel at either phase of his capital trial. But for this substandard performance, there is a reasonable likelihood that the result of each phase would have been different.

* * * *

I. *Repeated and Continuing Prosecutorial Misconduct*

147. Several acts by prosecutors in Mr. Banks' case distorted the truth-seeking function of the trial and deprived him due process of law. Their actions including, but by no means limited to those examples which follow, deprived Mr. Banks of rights guaranteed him by the Fourteenth Amendment.

148. The prosecutors purposefully utilized inflammatory and materially misleading jury argument at both phases of trial. At the guilt phase, the prosecutors' misconduct included a litany of references to their personal belief in the strength of

the State's case. Tr. 2269 ("I'm proud of what Deputy Willie Huff found . . . . To begin with, he brings us the truth and like I said, this is a search for truth"); *id.* ("he went a step further and he solved for us one of the questions we have to answer"); 2270 ("Aren't we glad that we've got experts to help us find out the truth about these matters?"); id. ("Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it?"); *id.* ("Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth."); *id.* ("in order to bring you the whole truth, we call [sic] as our witness Marcus Jefferson"); 2271 ("I ask you to search your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengeance [sic] or for advantage or to save their hides. I didn't see any."); 2272 ("murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did"); 2273 ("We take our witnesses and we take the proof as it is given to us as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you absolute truth") (emphasis added); 2276 ("Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth: That doesn't lie"); 2277 ("He [Whiteurs] told you the truth"); 2281 ("You know he [Whiteurs] told the truth").

149. This repeated practice of vouching for the credibility of its witnesses along with the insistence that the State witnesses were telling the "truth," denied Mr. Banks a fundamentally fair trial as guaranteed by the Sixth and Fourteenth Amendments

150. Further, the prosecutors' guilt-phase closing arguments contained other impermissibly inflammatory arguments that deprived the proceeding of fundamental fairness

See e.g., Tr. 2303 ("We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County"); ("I want you to go from this place proud and holding your head high. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed"). The prosecutors also, time and again, urged the jury to consider the feelings of the victims' families in determining Mr. Banks' *guilt*. Tr. 2267 (discussing the grief of the deceased's father); 2268 (describing the deceased's stellar character); 2270 (urging jury to weigh the "rights" of the deceased in determining guilt); 2278 (deploring that the deceased will "never see our rain" or "feel the warm sunshine on his cheeks"). While some such argument might, within Constitutional limits, be permitted at the punishment phase, each of these passages occurred during the guilt-phase argument. As a result, Mr. Banks' guilt was measured in large part not by the strength of the prosecution's evidence, but by the perceived tragedy of the victims' deaths. This misconduct, too, demands that Mr. Banks' conviction be reversed.

151. One additional argument made during the guilt-phase closing argument also warrant *habeas* relief:

> If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery.

Id. at 2266. This "colorful" analogy was designed to focus the jury's attention on the *color* of Mr. Banks' "hide," and the difference between his color and that of his alleged victim. This racist tirade alone requires the reversal of Mr. Banks' conviction.

152. Further, the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363

U.S. 83 (1963). This evidence included information that pointed to another suspect in the murder, information that linked prosecution star witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

153. Additionally, the case against Mr. Banks turned largely on the pivotal testimony of one witness: prosecution witness Charles "Two-Two" Cook. It cannot be disputed that the testimony of Charles "Two-Two" Cook was the focus of the State's case at the guilt phase of Mr. Banks' trial, as is evident from the amount of time devoted to it in the closing arguments of both sides. See Tr. 2272-2276, 2281-2291, 2294, 2297-3000. Likewise, Cook's credibility was as critically important as the content of his testimony; if the jury believed him, they would probably convict Mr. Banks. Further, if they convicted Mr. Banks, they would probably return an affirmative answer to the second special issue, because of Cook's damning allegation that Mr. Banks acknowledged having killed the victim "for the hell of it." As a result, the prosecutors' actions in concealing from the jury Cook's enormous incentive to testify in a manner favorable to the State require that this Court reverse Mr. Banks' conviction and sentence. The prosecution's failure to disclose that Cook stood to profit so enormously by his testimony, narrowly evading a possible life term in prison, requires the reversal of Mr. Banks' conviction and sentence of death.

154. The prosecution engaged in improper conduct by appealing to the jury on religious grounds at the guilt and sentencing phases of Mr. Banks' trial. This irresponsible and impermissible evocation of religion had its desired prejudicial

effect. It signaled to juror Wyant that her misguided and racially intolerant religious beliefs could direct her decision. Her statement also reveals that the jury was led in collective prayer by the jury foreman. HPr. Exhibit S. A capital sentencing jury operating under the belief, introduced and nurtured by the prosecution, that it is working hand-in-hand with God is particularly objectionable. There is the "intolerable danger" that jurors will minimize the importance of their role in deciding the fate of the accused by, in effect, seeing themselves as merely God's agents.

155. Finally, the prosecution's argument that it was not within the jury's power to consider mercy was improper.

156. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Banks by the federal Constitution was to deny him a fundamentally fair trial. Mr. Banks' conviction and sentence must be overturned.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed June 12, 1998]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

MOTION FOR LEAVE TO CONDUCT DISCOVERY

DELMA BANKS, JR., by and through counsel, respectfully moves this Court pursuant to Rule 6 of the Rules Governing Cases Brought Under 28 U.S.C. § 2254, for leave to conduct discovery as specified below.

A. *Introduction*[1]

1. This is a habeas corpus proceeding filed by an indigent state prisoner. The petitioner, Delma Banks, is a capitally-sentenced inmate who has asserted in his petition for wit of habeas corpus numerous grounds upon which his conviction and death sentence stand in violation of the Constitution of the United States.

2. Discovery is necessary to make available to Mr. Banks facts that are crucial to proving his ineffective assistance of counsel and prosecutorial misconduct claims. The information requested is not otherwise available. Mr. Banks is entitled to discovery because there are factual disputes that, if resolved in his favor, would entitled him to relief. Additionally, as set forth in the Motion for Evidentiary Hearing submitted herewith, Mr. Banks was not afforded a full and fair evidentiary hearing in state court. The requested discovery is warranted in order for Mr. Banks to set forth fully his right to an evidentiary hearing before this Court.

[1] *See* Petition for Writ of Habeas Corpus for the background facts underlying this Motion for Leave to Conduct Discovery.

3. The limited discovery which petitioner seeks is necessary and reasonably calculated to lead to admissible evidence in connection with two of petitioner's claims:

(A) that petitioner received ineffective assistance of counsel in that trial counsel (i) failed to adequately challenge the testimony of the state's key witness, Charles Cook, (ii) and failed to challenge Willie Huff's credibility; and

(B) that the state failed to (i) reveal its secret agreement with its key witness, Charles "Two-Two" Cook, (ii) reveal that Robert Farr was a police informant, and (iii) reveal that Mr. Banks' arrest in Dallas was the result of a "set-up."

B. *This Court Should Permit Petitioner To Conduct Limited Discovery*

4. The state's most important witness was Charles Cook. 8 R 1959. Much of the state's evidence of guilt—Mr. Banks' alleged extrajudicial "confession," his alleged presence in Dallas driving Whitehead's car—came before the jury through the testimony of one witness: Charles Cook.

5. Mr. Cook's credibility and veracity were important issues for the jury. The state acknowledged that Cook had an extensive criminal record and that at the time of the trial, Cook had been incarcerated for 113 days in Dallas County pursuant to an indictment for arson for setting his sister's

house on fire. 8 R 2114-2115.[2] What the jury did not know was that Cook was testifying pursuant to a generous "deal" cut with the prosecutors—a deal that called for dismissal of charges then pending against Cook.[3] The prosecutors' determined concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

6. The "deal" Cook made with the State had two parts. First, in return for his testifying against Mr. Banks in a manner favorable to the prosecution, the prosecution agreed not to charge Cook as an accessory to the Whitehead murder. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 18 (affidavit of Patrick DeLaune re Charles Cook). Second, Texarkana prosecutors agreed to secure the dismissal of an arson charge pending against him in Dallas on condition that he inculpate Mr. Banks in the Whitehead killing. At the time of trial, Cook was a parolee from the Texas prison system. Despite the fact that the victim of the arson was Cook's sister, and that she had stated under oath that she did not wish to continue to pursue the charge against Cook, state authorities

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[2] The State further acknowledged that the arson case should be tried given the length of time Cook had been incarcerated. 8 R 2151.

[3] During Mr. Banks' trial, on cross-examination, Mr. Cooksey attempted to reveal Cook's bias by questioning him about the pending arson charges:

> Cooksey: Have you been indicted for arson?
> Cook: Yes, sir.
> Cooksey: Did they put the habitual criminal act on you?
> Cook: Yes, sir.
> Cooksey: And they got you where you've got to testify, haven't they, Mr. Cook?
> Cook: No, sir.

9 R2154.

refused both to dismiss the charges or release him prior to Mr. Banks' trial. *Id.*, Vol. II, at 21 (Dallas Court Records of Charles Cook). Indeed, rather than dismissing the charges, the Dallas prosecutors enhanced the charges two months before Mr. Banks' trial by alleging that Cook was a habitual offender—exposing him to a possible sentence of life imprisonment. *Id.* Fortunately for Cook, his testimony against Mr. Banks in Texarkana promptly *and fully* accomplished what his sister's pleas could not; only days after he testified against Mr. Banks in Bowie County, all charges against him in Dallas were dismissed and he walked out of the Dallas County jail a free man.[4] *Id.* These circumstances virtually compel the conclusion that the Bowie County prosecutors bargained for Cook's testimony, and agreed to have Dallas authorities dismiss the pending charges against him in return for his cooperation.

7. Robert Farr testified on behalf of the state at both the guilt and punishment phases. His testimony included description of a trip he took with Mr. Banks and Marcus Jefferson to Dallas on April 23, 1980, the evening Mr. Banks was arrested. During cross examination, defense counsel asked Farr whether he had tipped off lead investigator Willie Huff about his trip to Dallas with Mr. Banks.[5] 9 R 2326-2327. He

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[4] One year later, Cook cited his stellar performance for the state in a letter he wrote to a judge in Dallas asking for a favorable recommendation to commute a six year sentence he received, subsequent to Mr. Banks' trial, after pleading guilty on July 7, 1981, to the offense of passing a forged instrument. He wrote:

> I Charles Edward Cook testerfive [sic] for the State in a capital murder trail [sic] in Bowie County in 1980. I was taken to Texakana, Texas [sic] from the Dallas county jail by Sheriff Willie Huff. I did a very good job for the State, me and my wife. The suspect (Delma Banks Jr) recive (sic) the death penalty.

Ex parte Banks, Application No. 80-F-86-102-C, Vol. 11, at 21.

[5] Willie Huff had testified at the Examining Trial on May 21, 1980 that he had received a telephone call from a confidential informant who

also asked Farr whether he had ever taken money from the police and whether the police had promised him anything. Farr answered all these questions in the negative. 8 R 2105.

8. Although Robert Farr denied working for the police to build a case against Mr. Banks, evidence exists that Farr was in fact a police informant and that he "set-up" Delma's arrest in Dallas. First, Demetra Jefferson knew that Robert Farr illegally obtained prescription drugs and had served as a snitch for law enforcement agencies. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 134 (affidavit of Rob Owen re Demetra Jefferson). Second, Gary Owen, a former police officer with the Arkansas Police Department, testified at trial that he had used Farr as an informant. 9 R 2379-2383. Finally, Willie Huff's testimony at the Examining Trial held on May 21, 1980, confirmed that he received a telephone call from a confidential informant who told him that Mr. Banks was going to Dallas. Statement of Facts from Examining Trial, at 15.

9. Mr. Banks respectfully requests that the Court grant leave to allow his counsel to seek depositions and/or the production of documents and physical evidence as follows:

(A) All documents in possession of the Federal Bureau of Alcohol, Tobacco, and Firearms, the Texas Department of Public Safety, the Bowie County Sheriff's Office, the Bowie County Jail, the Texarkana Texas Police Department, the Texarkana Arkansas Police Department, the Dallas Police Department, the Miller County Sheriff's Office, the Miller County District Attorney's Office, the Dallas County District Attorney's Office, the Bowie County District Attorney's

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informed him that Mr. Banks was going to Dallas to obtain a weapon. Statement of Facts of Hearing on Examining Trial, May 21, 1980, at 15-16. The District Attorney vigorously objected to Mr. Cooksey's questioning of Willie Huff regarding the identity of his confidential informant. *Id.* at 24-27.

Office, the Bi-State Justice Center, and/or the Bi-State Information Center regarding Robert Farr's record of service as a police informant, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge concerning Robert Farr's services as a police informant.

(B) All documents in the possession of the Texarkana, Texas Police Department, the Bowie County Sheriff's Office, the Bowie County Jail, the Dallas Police Department, the Bi-State Justice Center, the Bi-State Information Center and/or the Texas Department of Public Safety concerning the circumstances and facts relating to the shooting of Richard Whitehead and the investigation thereof, and depositions of police officers involved in Mr. Banks' arrest on April 24, 1980, including L.R. Cadena and H.K. Sanders, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge concerning Mr. Banks' arrest.

(C) All documents in the possession of the Bowie County Jail, the Dallas County jail, the Bi-State Correctional Facility, and the Texas Department of Criminal Justice identifying the prison personnel on duty during Charles Cook's incarceration from May 14, 1980 through October 2, 1980 and/or relating to his behavior during his incarceration, and depositions of prison personnel with responsibility for Mr. Cook during his incarceration from May 14, 1980 through October 2, 1980, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Cook's incarceration.

(D) All personnel records regarding Willie Huff in the possession of the Bowie County Police Department, the Bowie County Jail, the Texarkana Texas Police Department (including the Narcotics Task Force), the Texas Department of Public Safety, the Texas Commission on Law Enforcement and Officer Safety, the Bowie County District Attorney's Office, and/or the Bowie County Sheriff's Department, including any information regarding promotions, demotions, suspensions, disciplinary records, complaints, and/or internal affairs investigations, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Huffs' personnel record.

(E) All records, reports, investigative reports, or notes regarding Willie Huff in the possession of the Bowie County Police Department, the Texarkana Texas Police Department, the Bowie County Sheriff's Department, the Texas Rangers, the Bowie County District Attorney's Office, and/or the Dallas County District Attorney's Office and depositions of individuals with responsibility for investigations of Willie Huff, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Huffs' record.

(F) All training manuals and policy statements regarding the exercise of prosecutorial discretion as to (1) when to reindict an individual as an habitual offender and (2) information regarding when and how police and prosecutors suspected of abusive law enforcement practices are investigated and disciplined, and/or deposition of any and all individuals in the Dallas County District Attorney's Office and the Bowie County District Attorney's Office with knowledge of the above-mentioned policies.

10. Mr. Banks is plainly entitled to these materials. Rule 6 of 28 U.S.C. § 2254 states in part:

> [a] party shall be entitled to invoke the process of discovery available under the Federal Rule of Civil Procedures and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

11. The United States Supreme Court in *Harris v. Nelson*, 394 U.S. 286, 290, 89 S.Ct 1082, 1086 (1969), set forth the standard governing the exercise of the Court's discretion with respect to such discovery requests.

> We do not assume that the Courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them . . . . But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally, and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

12. The Court's recent reversal of a lower court's refusal to permit discovery to a habeas petitioner confirms Mr. Banks' entitlement to the requested discovery. *See Bracy v. Gramley*, 138 L.Ed.2d 97 (1997). In *Bracy*, the petitioner alleged his trial judge had taken bribes in other cases and held bias against him. As the judge had recently been successfully prosecuted for extortion and racketeering, *Bracy* generally sought access to the federal prosecutor's investigative file to develop evidence that would show "he was denied a fair trial because 'in order to cover up the fact that [the trial judge] accepted bribes from defendants in some cases, [the judge] was prosecution oriented in other cases.'" 138 L.Ed.2d at 102 *quoting in part United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 990 (ND Ill. 1994). The court of appeals had

denied discovery, reasoning that Bracy had failed to show "good cause." But because Bracy, like Mr. Banks', pointed to specific circumstances that suggested further proof of the judge's bias might well be uncovered if discovery was granted, the Court held that the district court abused its discretion in not granting the requested discovery.

13. *Bracy* reconfirms that discovery is warranted when it is "indispensable to a fair, rounded, development of the material facts." *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995). *See Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996) (petitioner entitled to discovery when there is a factual dispute that would entitle her to relief and if state has not afforded her a full and fair evidentiary hearing); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (denial of discovery was an abuse of discretion when discovery was necessary to fully develop facts in support of claim for relief); *Gaitan-Campanioni v. Thornburgh*, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991) ("court should not hesitate to allow discovery where it will help illuminate issues underlying applicant's claim"). Access to discovery is necessary for Mr. Banks to fully develop facts in support of his claims and in support of his request for an evidentiary hearing. *See East v. Scott*, 55 F.3d at 1002 (court granted discovery and stated that court should defer ruling on request for evidentiary hearing until after discovery completed).

14. Mr. Banks respectfully submits that the limited discovery he seeks is appropriate and necessary, and is likely to lead to relevant and admissible evidence in support of the aforementioned claims. Moreover, Mr. Banks respectfully submits that the aforesaid discovery also is necessary in order to afford him a fair opportunity to present all facts relevant to his application for an evidentiary hearing.

15. Counsel represents that we will conduct such discovery expeditiously and without imposing unreasonable or undue burdens on the parties, or on the police and other state

officials and individuals from whom the discovery is requested. Counsel further represents that we will attempt in good faith to resolve any discovery disputes which may arise without resort to judicial intervention.

* * * *

WHEREFORE, Mr. Banks hereby respectfully requests that the Court allow 90 days for the completion of discovery and an additional 30 days thereafter for counsel to supplement his motion for an evidentiary hearing.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed June 16, 1998]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.

Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

MOTION FOR AN EVIDENTIARY HEARING

DELMA BANKS, JR., by and through counsel, respectfully submits his motion, pursuant to former 28 U.S.C. § 2254(d), and seeks an evidentiary hearing on (i) claims alleged in his petition concerning ineffective assistance of counsel and prosecutorial misconduct, as well as (ii) to supplement the record with regard to his claim based upon *Swain v. Alabama*, 380 U.S. 202 (1965), and to, if necessary, (iii) show sufficient reasons exist to excuse any procedural defaults in the state courts. In support of this motion, Mr. Banks states as follows:

1. This is a habeas corpus proceeding filed by an indigent state prisoner. The petitioner, Delma Banks, is an indigent capitally sentenced inmate who has asserted in his petition for writ of habeas corpus numerous grounds upon which his conviction and death sentence stand in violation of the United States Constitution.

2. Mr. Banks' right to an evidentiary hearing in federal court is governed by *Townsend v. Sain*, 372 U.S. 293 (1963),

and works in conjunction with former § 2254(d). Townsend sets forth the circumstances under which a federal habeas court is required to hold an evidentiary hearing. Under *Townsend*, a petitioner is entitled to a hearing if he alleged facts which, if proven, would entitle him to habeas relief under § 2254, and if he "did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. at 312. In the *Townsend* court's language, "a federal court *must* grant an evidentiary hearing to a habeas applicant under the following circumstances: If

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Id. at 313 (*emphasis added*). As a result, a federal habeas court is *required* to hold an evidentiary hearing if any of the above circumstances were satisfied. *Townsend* makes clear, however, that the habeas court retained the power, vested in the exercise of its sound discretion, to conduct a hearing even if none of these circumstances exist. *See id.* at 312 ("[T]he power of inquiry on federal habeas corpus is plenary.")

3. The fifth circumstance listed in *Townsend* warrants additional comment. Townsend held that if the material facts

were not "adequately developed in the state-court hearing," the federal habeas court was required to conduct an evidentiary hearing only if the failure to "adequately develop" the "material facts" was not due to the petitioner's "inexcusable neglect" *Id.* at *317, citing Fay v. Noia*, 372 U.S. 391, 438 (1963). The federal court is prohibited from conducting an evidentiary hearing only if the petitioner has "deliberately bypassed" the state fact-finding procedures. This "deliberate bypass" standard, originally drawn from *Fay v. Noia*, 372 U.S. 391 (1963), was abandoned in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Under *Tamayo-Reyes*, a habeas petitioner who fails to "adequately develop" the "material facts" in the state courts must show both "cause" and "prejudice" in order to satisfy the fifth circumstance of *Townsend and* compel the federal court to hold an evidentiary hearing. *See id.* at 8.[1]

4. Former §2254(d) was enacted after *Townsend* and works in tandem with *Townsend's* standards. Like *Townsend*, former §2254(d) sets forth certain circumstances in which state factfinding process is not entitled to a presumption of correctness.[2] While the circumstances listed in former

[1] A petitioner was entitled also to an evidentiary hearing if he could establish that a "fundamental miscarriage of justice" would arise if a hearing was not held. *See Tamayo-Reyes*, 504 U.S. at 12.

[2] Former § 2254(d) provides that a state-court "determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

§ 2254(d) closely track those outlined in *Townsend*, they do not, as do the *Townsend* circumstances, serve to indicate when a federal hearing was required. Instead, they specify the circumstances under which a federal habeas court is no longer obliged to defer to state court findings of fact. In other words, the statute sets forth the circumstances under which state court findings of fact are no longer entitled to a presumption of correctness. While the two sets of circumstances are "obviously intertwined," *Tamayo-Reyes*, 504 U.S. at 21 (O'Connor, J., dissenting), because the former § 2254(d) presumption of correctness was usually defeated by the same showing required to mandate a hearing, they nonetheless served distinct roles. *See id.*

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

Unless he established one of the above factors, a petitioner could defeat the presumption of correctness only "by convincing evidence that the factual determination by the State court is erroneous." former 28 U.S.C. § 2254(d).

a. The process by which the state court "determined" the facts in Mr. Banks' case is inadequate and thus, the state court findings of fact are not entitled to former § 2254(d)'s presumption of correctness.

Ineffective Assistance of Counsel

5. Mr. Banks has pleaded, *inter alia*, a comprehensive claim of ineffective assistance of counsel. *See* Petition, paragraphs 97 through 122. This claim was timely presented in the state habeas court. The state court factual findings are not entitled to a presumption of correctness under former § 2254(d) because the process by which the state court "determined" the facts was inadequate to provide a full, fair and adequate hearing.

6. Mr. Banks requests an evidentiary hearing regarding trial counsel's ineffectiveness concerning the following areas:

(A) Whether trial counsel was ineffective in failing to conduct a constitutionally adequate investigation both into the state's case against Mr. Banks and possible defenses.

(B) Whether trial counsel was ineffective in failing to follow up on his pretrial motions, uncover facts essential to the successful prosecution of those motions, and question prospective jurors about their exposure pretrial publicity.

(C) Whether trial counsel was ineffective in failing to insure that members of the African-American community were represented on the jury.

(D) Whether trial counsel was ineffective in failing to acquaint himself with the facts the State would attempt to prove at the guilt phase and in failing to highlight the many inconsistencies and gaps in the State's case through reasonably adequate cross-examination.

(E) Whether trial counsel was ineffective with respect to the penalty phase in failing to make any meaningful investigation of the state's evidence of future dangerousness.

(F) Whether trial counsel was ineffective with respect to the penalty phase in failing to present all the mitigating witnesses who were prepared to testify on Mr. Banks' behalf and in failing to prepare the handful of witness he actually placed on the stand.

(G) Whether trial counsel was ineffective with respect to the penalty phase in failing to have Mr. Banks evaluated by any mental health professional and for failing to seek expert assistance in understanding or describing Mr. Banks' mental limitations to the jury.

(H) Whether trial counsel was ineffective with respect to the penalty phase in failing to take a social history from Mr. Banks or from his family and for failing to conduct a search for mitigating witnesses.

7. During state habeas proceedings, Mr. Banks requested a plenary evidentiary hearing on his ineffective assistance of counsel claim. *See Ex parte Banks*, Application No. 80-F102-C, Vol. I at 51 and 76. The state habeas court failed to hold a hearing and summarily denied relief, presumably based upon affidavits submitted by both parties. The court's one conclusory finding states only that "counsel for Applicant at trial did give Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." Findings of Fact and Conclusions of Law, dated February 22, 1992.

8. Findings such as these, and based solely on a paper record, are not entitled to a presumption of correctness. *Salazar v. Johnson*, 96 F.3d 769 (5th Cir. 1996); *see Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996); *Amos v. Scott*, 61 F.3d 333 (5th Cir. 1995). While each case must be individually screened to determine whether "a paper hearing is appropriate to the resolution of the factual dispute underlying the petitioner's claim," *id.* at 792, *citing May v. Collins*, 955

F.2d 299, 312 (5th Cir.1992); *see Amos*, *supra*, at 347 (same); *Perillo v. Johnson*, *supra*, at 446 (5th Cir. 1996) (same), in the instant case, a paper hearing was inadequate to resolve Banks' ineffective assistance of counsel claim.

9. Mr. Banks submitted numerous affidavits during the post-conviction proceeding in support of this claim. These materials presented a broad array of evidence that trial counsel inexplicably failed to utilize during the guilt phase of Mr. Banks' trial. Instead, the defense rested at the first stage of the trial without producing any evidence at all. There was much that could have been offered.

10. For example, Demetra Jefferson could have testified that the reason Mr. Banks went to Dallas was to locate a home for she and their children to live. He and Ms. Jefferson were living together at the time with their four children. She also knew that Robert Farr illegally obtained prescription drugs and served as a snitch for law enforcement agencies. *See Ex parte Banks*, Application No, 80-F-86-102-C, Vol. II at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson[3], and affidavit of Lynn Lamberty). Demetra Jefferson's information would have provided an alternative explanation for Mr. Banks' trip to Dallas on April 12 or 13. It also could have provided cross-examination material with which to challenge the credibility of Robert Farr.

11. The same inexplicable failure of defense counsel to present evidence extends to the punishment phase of trial as well. An alleged fight between Mr. Banks and Vetrano Jefferson proved central to the state's contention that Mr. Banks should receive the death penalty. The jury never knew, however, that Mr. Banks struck Mr. Jefferson only to protect

[3] Demetra Jefferson was unable to sign this affidavit as she was recovering from giving birth to her baby. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson and affidavit of Lynn Lamberty).

Demetra Jefferson, who was then pregnant. *Id.* Additionally, Mr. Banks submitted additional evidence which proved that both trial counsel, Lynn Cooksey, and trial counsel's investigator, Dennis Waters, failed to interview important mitigation witnesses, *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V at 42 (affidavit of Curtis Dismuke, Exhibit R.III-B); an affidavit evidencing Waters' cursory interview of potential mitigating witnesses, *id.*, Vol. V at 42 (affidavit of Rev. G.W. McGraw, Sr., Exhibit R.III-A); *id.*, Vol. II at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson, and affidavit of Lynn Lamberty); affidavits evidencing Mr. Banks' brain damage, deficiencies in long and short term memory, and diffuse neurological damage, *id.*, Vol. II at 120 (Affidavit of Gregoria Pina); and affidavits detailing trial counsel's failure to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of trial, *id.*, Vol. II at 4 and 13 (affidavits of Mr. and Mrs. Banks). Moreover, the trial record itself demonstrates trial counsel's failure to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of trial. 8 R 2358-2359.

12. Affidavits submitted by Cooksey and his investigator, Dennis Waters, fail to adequately resolve the questions of why this evidence was not used during the trial and why an adequate investigation was not conducted. The state, after at least four requests for additional time, filed its Answer to petitioner's state habeas application in early October 1992, and therein quoted and cited from an "affidavit" it had prepared for Lynn Cooksey. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. IV, at 9. Based upon this document, which was never produced, the state asserted that Cooksey began preparation of the punishment phase well in advance of the actual sentencing date and that he and Waters investigated the case for mitigation fully cognizant of all applicable rules.

Because this affidavit was never produced or filed, the state habeas judge could not have relied on it to conclude that counsel was effective.

13. On February 5, 1993, Mr. Cooksey sent a copy of an affidavit *different* from the one quoted by the State in its Answer, to Mr. Banks' state habeas counsel. *See* copy of letter from Mr. Cooksey to state habeas counsel attached hereto. This affidavit was eventually filed with the state habeas court. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V, at 137. Unlike the non-existent affidavit quoted and cited by the State, the signed affidavit did not state that Cooksey began preparation for the punishment phase well in advance, or that he investigated the case for mitigation. Instead, it states that "I believe the record would reflect I consulted with my client on these matters." *Id.* As discussed above, this assertion is flatly refuted by the record. In fact, this affidavit supports Mr. Banks' claim that Cooksey did not meet, consult, or prepare witnesses to testify on Mr. Banks' behalf during the penalty phase. Cooksey only affirmed that he consulted with "my client" and no one else. Furthermore, his wholly conclusory statement that "My presentation of Delma Banks' defense was based on the trial strategy I chose to put forward on his behalf" fails to resolve the issue of his effectiveness. Without specific information detailing what his trial strategy was based upon, the state habeas judge had no opportunity to determine whether counsel was ineffective for failing to use the available evidence contained in the above-mentioned affidavits submitted by Mr. Banks. In other words, the paper hearing did not yield information regarding what factors informed that trial strategy. *See Wilson v. Butler*, 813 F.2d 664, 672 (5th Cir. 1987) (Counsel may make a strategic decision against pursuing a particular line of defense after less than complete investigation only to the extent that reasonable professional

judgment supports the limitations on investigation. Therefore, evidentiary hearing granted on issue of whether counsel was ineffective for failing to investigate mitigating witnesses).

14. The affidavit of Dennis Waters also failed to resolve the factual dispute. It stated, *inter alia*, that Mr. Waters interviewed witnesses who could testify on behalf of Mr. Banks' character. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V, at 136. However, Waters' affidavit fails to identify the witnesses he interviewed or how much time he spent with them. In fact, this account of having talked with mitigation witnesses is flatly refuted. *Id.*, Vol. V at 42 (affidavit of Curtis Dismuke, Exhibit R.III-B). Moreover, another potential mitigating witness attests that Mr. Waters spent only five minutes questioning him. *Id.* (affidavit of Rev. G.W. McGraw, Sr., Exhibit R. III-A). Additionally, Mr. Cooksey could not have made any strategic decisions based upon any information Waters may have learned from these witnesses because Cooksey already admitted at trial that he did not know what the mitigation witnesses were going to testify about during the penalty phase. 9 R 2358-59.

15. Not only did the hearing fail to resolve the ineffective assistance of counsel claim since numerous factual questions remain unresolved, but also the state habeas court did not make any findings of fact which are entitled to a presumption of correctness. The only finding made by the state habeas court on this issue is its conclusory statement that "[t]he Court finds counsel for Applicant at trial did give the Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." Findings of Fact and Conclusions of Law, dated February 22, 1992. The court made no background factual findings in support of this conclusion, including whether counsel's failure to present the full range of mitigating evidence available in Mr. Banks' case was a strategic decision, and never stated that he found Cooksey's and Waters'

affidavits credible. As the Fifth Circuit has stated, "Of course, if the state habeas court did not make factfindings on an issue, the federal habeas court is free to examine the issue unconstrained." *Perillo*, 79 F.3d at 446; *See Armstead v. Scott*, 37 F.3d 202, 209 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1709 (1995).

16. Evidentiary hearings are mandated when the evidence raises a genuine issue of fact and where the state court fails to make findings on all unresolved issues, *Perillo, supra; Salazar, supra*, at 792 (evidentiary hearing required because district court's reliance on state court's "implicit" finding regarding ineffective assistance of counsel was unsupported by the record) and when the court fails to make factfindings on an issue. *See Perillo, supra*, at 446.

17. A hearing is warranted here because the evidence presented by petitioner Banks to the state habeas court shows that counsel's failure to investigate was unreasonable and prejudiced him at each phase of trial. The state court's wholly conclusory finding of fact failed to resolve this issue; indeed, there are no factual findings entitled to a presumption of correctness. The factual disputes raised by the proffered affidavits as to counsel's ineffectiveness raise a genuine issue of fact that can only be resolved through an evidentiary hearing in this Court.

Prosecutorial Misconduct

18. Mr. Banks has pleaded, *inter alia*, a straightforward claim of prosecutorial misconduct. *See* Petition, paragraphs 147 through 156. First, Mr. Banks pleaded that the state failed to reveal a secret agreement it had with Mr. Cook, the state's star witness. The prosecutors' concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*,

360 U.S. 264 (1959). Second, Mr. Banks pleaded a claim that the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363 U.S. 83 (1963). This evidence included information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest in Dallas as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

19. This claim was presented previously in the state habeas court. However, factual development of these claims was impeded by that court's rejection of Mr. Banks' requests for discovery, investigative funds, and an evidentiary hearing. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. I, at 76 (Petitioner's application for writ of habeas corpus); Vol. I at 51 (motion for stay and evidentiary hearing); Vol. IV, at 1 (motion for investigative and court analyst funds); Vol. V, at 45 (motion for hearing on motion for discovery and compliance with texas open records act). Thus, Mr. Banks was deprived a full and fair hearing on the issue of prosecutorial misconduct.

20. In support of his application for a writ of habeas corpus, for discovery and for an evidentiary hearing during state habeas proceedings, Mr. Banks proffered the affidavit of Pat DeLaune, an investigator with the Texas Resource Center. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 18. Mr. DeLaune interviewed Cook on January 10, 1992, in Dallas, Texas. During that interview, Cook revealed that state officials told him that Mr. Banks was accusing him of involvement in Richard Whitehead's murder. He later learned that the state's representations were untrue. Cook also revealed that Texarkana authorities threatened to charge him as an accessory to capital murder and threatened to prosecute him under the habitual offender law for his pending arson

charges if he did not testify for the prosecution at Mr. Banks' trial.

21. During Mr. Banks' trial, on cross-examination, Mr. Cooksey attempted to establish Cook's bias by questioning him about the pending arson charges:

Cooksey:	Have you been indicted for arson?
Cook:	Yes, sir.
Cooksey:	Did they put the habitual criminal act on you?
Cook:	Yes, sir.
Cooksey:	And they got you where you've got to testify, haven't they, Mr. Cook?
Cook:	No, sir.

9 R 2154.

22. Mr. Banks also proffered Cook's criminal records during state habeas proceedings. This history demonstrates that at the time of his testimony for the State at Mr. Banks' trial, Cook faced a long prison term on pending arson charges for setting fire to his sister's house. The records show that Cook was indicted on May 28, 1980, for the offense of arson. Cook was reindicted under Texas' habitual offender statute in August 13, 1980, for the same offense, despite the fact that his sister had signed an affidavit of non-prosecution prior to the reindictment. On October 2, 1980, two days after his testimony at Mr. Banks' trial, the State of Texas dismissed the charges against Cook.

23. On July 7, 1981, after Banks' trial, Cook pled guilty to the offense of passing a forged instrument. In his letter to the judge asking for a favorable recommendation to commute his six year sentence for this forgery offense, Cook characterized his testimony in Mr. Banks' trial as follows:

> I Charles Edward Cook testerfive [sic] for the State in a capital murder trail [sic] in Bowie County in 1980. I was taken to Texakana, Texas [sic] from the Dallas

> county jail by Sheriff Willie Huff. I did a very good job for the State, me and my wife. The suspect (Delma Banks Jr) recive [sic] the death penalty.

Ex parte Banks, Application No. 80-F-86-102-C, Vol. II, at 21.

24. The State responded to the allegations of misconduct by proffering affidavits of Willie Huff and James Elliott which stated summarily that there was no secret agreement with Cook in exchange for his testimony, *Id.*, Vol. V, at 116 and 117, and an affidavit of Kevin Byrne, an assistant district attorney in Dallas County; which stated only that he had no recollection of any deal with Cook. *Id.*, Vol. V, at 118.

25. The state habeas court's resolution of this issue through a paper hearing failed to provide a full and fair adjudication because it leaves the merits of the factual dispute unresolved.

26. First, the state offers no credible evidence to explain why felony charges on arson (cause No. F80-06324-LM and cause No. F80-9117-habitual) pending against Cook in Dallas County, were dropped so suddenly and so shortly after his testimony at Mr. Banks' trial. The state's two proffered affidavits from persons involved in law enforcement in Bowie County, *not* Dallas County, and an affidavit from a Dallas prosecutor in a case that Cook was charged with *after* his testimony against Mr. Banks [4] do not explain why the *arson* charges pending against Cook during the pendency of Mr. Banks' trial were mysteriously dropped. This indisputable

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[4] Respondent Johnson is mistaken in his assertion that the State submitted an affidavit of the Dallas prosecutor who handled the arson case against Charles Cook. Answer at 111. The State proffered the affidavit of Kevin Byrne, the assistant district attorney who prosecuted Cook's forgery conviction, cause No. F81-2140-P, a charge that Cook received *after* Delma's trial. Mr. Byrne was not the district attorney who prosecuted Cook's arson charges. Thus, this affidavit is irrelevant to the issue of whether the state dropped Cook's pending arson charges in return for his testimony in Mr. Banks' trial.

fact, coupled with Cook's own admissions, *id.*, Vol. II, at 18, clearly establish. that. the question of whether there was a secret deal cannot be resolved fully, fairly and adequately without an evidentiary hearing.

27. With respect to Mr. Banks' claim that the state failed to reveal that Robert Farr was a police informant and that Mr. Banks' arrest in Dallas was a result of a "set-up," the state habeas court made no findings of fact. Thus, there are no factual findings entitled to a presumption of correctness.

28. When claims of prosecutorial misconduct are alleged, the claim must be resolved before the ultimate punishment constitutionally may be imposed:

> While we are cognizant of the toll habeas wreaks on finality, we are also concerned that both fairness and the appearance of fairness be preserved, especially in light of the punishment assessed. In our criminal justice system the prosecutor has at his disposal the substantial resources of the government as well as considerable other advantages. In exchange, that system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction."

Kirkpatrick v. Whitley, 992 F.2d 491, 496, (5th Cir. 1993). In *Kirkpatrick*, the Fifth Circuit remanded the case for an evidentiary hearing on prosecutorial misconduct because the allegations were supported by evidence and because the court could not make a determination concerning the claim of prosecutorial misconduct due to the inadequate factual record. *Id.*, at 497-98. Similarly, in the instant case, numerous questions regarding prosecutorial misconduct remain unresolved. Thus, Mr. Banks requests an evidentiary hearing regarding prosecutorial misconduct in the following areas:

(A) Whether the prosecution failed to turn over exculpatory evidence, including information that Robert Farr was a police informant and that Mr. Banks' arrest in Dallas was a "set-up."

(B) Whether the prosecution used perjured testimony in allowing Robert Farr to testify that he was not a police informant, and that he did not "set-up" Mr. Banks' arrest in-Dallas.

(C) Whether the prosecution failed to disclose that its star witness, "Two-Two" Cook, was testifying in return for leniency in a pending case.

(D) Whether the prosecution failed to disclose that its star witness, "Two-Two" Cook, was suffering from a mental illness at the time of his testimony at Mr. Banks' trial.

29. Mr. Banks is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel and prosecutorial misconduct because the material facts were not adequately developed in the state habeas court. Material facts are "those facts crucial to a fair, rounded consideration of a petitioner's claim." *Streetman v. Lynaugh*, 812 F.2d 950, 953 (5th Cir. 1987)(citation omitted). "Material facts have not been adequately developed where the petitioner alleges undeveloped evidence sufficient to call into question the reliability of the state court's determination of petitioner's federal claim." *Id.* at 958. The factual disputes raised by the proffered affidavits raise genuine issues of fact that can only be resolved through an evidentiary hearing in this Court.

Systematic Exclusion of Minority Jurors Claim

30. Mr. Banks has also pleaded a claim based upon *Swain v. Alabama*, 380 U.S. 202 (1965). See *Petition* at paragraphs 75 through 90 and 133 through 136. While the state court held a hearing on this claim, the state's refusal to provide access to records in its possession relevant to this claim, the state court's unwillingness to order the state to provide this information, and its refusal to grant Mr. Banks investigative funds, prevented Mr. Banks from actually confirming the race of certain jurors who were peremptorily struck by the state during the relevant years. The state court

thereafter faulted Mr. Banks' statistical study because of this "missing" data.

31. Mr. Banks is now prepared to supplement the record with this missing data pursuant to Rule 7 of the Rules Governing § 2254 Proceedings.

Evidence Relevant to State's Procedural Default Arguments

32. Mr. Banks also reserves the right to seek a hearing, if necessary, to show that sufficient reasons exist to excuse any default made on any claim in state court. Respondent claims that four of the claims presented in the petition are default; while Mr. Banks sharply disputes this claim, a hearing might be necessary to resolve these issues.

b. Petitioner Banks did not fail to develop facts in state court and therefore should be entitled to a hearing in federal court so long as the standards set forth in *Townsend* are satisfied.

33. Mr. Banks did not fail to develop facts in state court in support of his claims of ineffective assistance of trial counsel, prosecutorial misconduct, and purposeful exclusion of African-American citizens from trial jury service.

34. Evidentiary hearings are required where the causes of the inadequate record and unreliable state proceedings are factors "external to the defense", such as a showing that the factual or legal basis of the defense was not reasonably available to counsel or that some interference by officials made compliance impossible. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Reed v. Ross*, 468 U.S. 1, 16 (1984); *Brown v. Allen*, 344 U.S. 443, 486 (1953). Also, the federal courts have extended no deference or weight to state court habeas determinations where state courts or state law have restricted the petitioner's ability to gather evidence needed to present their claims to the state court. *See Moore v. Kemp*,

809 F.2d 702, 730 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987); *Marble v. Edwards*, 457 F.2d 759 (5th Cir. 1972). In this case, the incompleteness of the State court record was the result of external factors, including the State habeas court's refusal to grant petitioner's motions for funds for expert assistance and its refusal to hold an evidentiary hearing. Furthermore, it is the result of the fear of witnesses, including Robert Farr, to provide information at the time of state habeas proceedings, and the state's failure to reveal exculpatory evidence. Thus, Mr. Banks did not fail to develop facts in state court in support of his claims for relief.

35. As detailed in the previous section, petitioner Banks proffered affidavits in support of his claims. Additionally, he requested discovery and an evidentiary hearing in state court in order to develop facts in support of his claims for relief. However, despite Mr. Banks' requests for discovery and a hearing, his requests were summarily denied by the state habeas court. Thus, Mr. Banks did not fail to develop facts in state court and is entitled to an evidentiary hearing in federal court pursuant to the standards set forth in *Townsend*.

CONCLUSION

On this day, Mr. Banks has filed a motion for leave to conduct discovery. Mr. Banks respectfully suggests that the most expeditious way to proceed is for the Court to act upon and grant Mr. Banks' discovery motion. Moreover, the Court should also grant Mr. Banks' requests for an evidentiary hearing regard-ing trial counsel's ineffectiveness and prosecutorial mis-conduct concerning the areas detailed above. Moreover, Mr. Banks reserves his right to amend this motion.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DELMA BANKS, JR §

V.S. § CIVIL ACTION NO. 5:96cv353
JUDGE DAVID FOLSOM

GARY JOHNSON, Director
Texas Department of Criminal Justice
Institutional Division

ORDER

Comes on to be considered the Motion for Leave to Conduct Discovery, filed herein by DELMA BANKS, JR. The court having considered same along with the Opposition to Petitioner's Motion for Leave to conduct discovery, finds that same should be granted in part and denied in part.

Background

On March 7, 1996, Petitioner filed his federal habeas petition in this Court. The petition alleged fourteen grounds for relief from Petitioner's conviction and sentence of death.[1] Respondent filed his Answer and Motion for Summary Judgment on September 23, 1996. The parties initially disagreed over whether the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [2] ("AEDPA"), were to be applied retroactively to pending federal habeas

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[1] Petitioner was convicted and sentenced to death by the 102nd District Court of Bowie County Texas, on October 1, 1980. This judgment and sentence was affirmed by the Texas Court of Criminal Appeals. *Banks v. Texas*, 643 S.W.2d 129 (Tex. Crim. App. 1982). Petitioner subsequently filed three separate state habeas petitions all of which were ultimately denied by the Texas Court of Criminal Appeals. The Respondent in this federal habeas action concedes that Petitioner has exhausted all state remedies.

[2] The effective date of the AEDPA was April 24, 1996.

proceedings. On September 17, 1997, the Court denied all pending motions, without prejudice to refiling same, as a result of *Lindh v. Murphy*, 527 U.S. 320 (1997), which held that the AEDPA was not retroactive to pending cases. On June 15, 1998, Petitioner filed his Motion for Leave to Conduct Discovery and Motion for Evidentiary Hearing. Respondent filed his Opposition to these Motions on July 7, 1998.

Motion for Leave to Conduct Discovery

Petitioner requests discovery limited to two areas of claimed ineffective assistance of counsel and three areas of claimed prosecutorial misconduct. Petitioner seeks discovery in relation to two claims of ineffective assistance of counsel: (1) counsel was ineffective in challenging the credibility of the State's primary witness, Charles "Two Two" Cook, regarding guilt or innocence; and (2) counsel was ineffective in challenging the credibility of, Willie Huff, the primary law enforcement officer who investigated the case. Petitioner also seeks discovery regarding alleged prosecutorial misconduct regarding: (1) failure to disclose a secret agreement with Charles Cook regarding favorable treatment in exchange for his testimony;[3] (2) failure to reveal that a second state witness Robert Farr, was a police informant; and (3) failure to reveal that Petitioner's initial arrest was the result of some "set up" arranged by law enforcement, Charles Cook and Robert Farr.

[3] The Court notes that although Petitioner indicates that he seeks to have discovery regarding the State's failure to disclose evidence of the "secret deal" it had with Charles Cook, he makes no specific request for discovery in that regard. Habeas Corpus Rule 6(b) requires that any request for discovery "be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced."

Applicable Law

Rule 6 of the Rules governing Section 2254 cases provides in part:

> A party shall be able to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so.

However, before addressing whether a petitioner is entitled to Rule 6 discovery, the Court must first identify the "essential elements" of the claim for which he is seeking discovery. *Bracy v. Gramely*, 520 U.S. 899, 117 S.Ct. 1973, 1979 (1997). Further, federal court is not a "forum in which to relitigate [a] state trial." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Where a Petitioner's allegations merely suggest that discovery might uncover evidence of a *prima facie* claim, such allegations are conclusory and insufficient to warrant Rule 6 discovery. *East v. Scott*, 55 F.3d 996, 1005 (5th Cir. 1995). In this case the Petitioner seeks discovery directed at his claim of ineffective assistance of counsel for failure to effectively cross examine the primary witness against him. If Petitioner's allegations are true and there was a "secret deal" between the state and the witness, then same should have been brought out on cross examination. Despite the Respondent's assertion to the contrary, Petitioner has set out in his Petition, specific, factual allegations which would entitle him to relief if same were proven true.

The United States Supreme Court in *Harris v. Nelson*, 394 U.S. 286 (1969), established the standard for the court to use in exercising its discretion with respect to discovery requests in habeas proceedings. The Court stated:

> We do not assume that the courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. . . . But where *specific allegations before the court show reason to believe that*

> *the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally*, and is therefore entitled to relief, it is the *duty* of the court to provide the necessary facilities and procedures for an adequate inquiry.

Id. at 299. Habeas Corpus Rule 6 is meant to be consistent with *Harris*. See, Advisory Committee's Note on Habeas Corpus Rule 6. Petitioner has shown good cause for allowing certain limited discovery in this matter.

Petitioner also seeks discovery regarding Willie Huff, the primary investigating officer in the case. Petitioner has made no claim that his trial counsel was ineffective for failing to effectively cross examine Officer Huff. Petitioner has alleged no facts which would support a claim of official misconduct by Officer Huff. Petitioner has made no showing of a *prima facie* case of entitlement to the discovery requested regarding Willie Huff and such request is denied. Similarly, Petitioner has failed to make specific factual allegations which would entitle him to relief regarding alleged police informant Robert Farr or an alleged "set up" of the arrest of petitioner. The request for discovery regarding those issues is therefore denied.

IT IS THEREFORE ORDERED that Petitioner be allowed the following limited discovery, to be conducted in accord with the Federal Rules of Civil Procedure:

1. Production of documents from the Bowie County Jail, the Dallas County Jail, the Bi-State Correctional Facility and the Texas Department of Criminal Justice, identifying the prison personnel on duty during Charles Cook's incarceration from May 14, 1980 through October 2, 1980.

2. Production of documents from the Bowie County Jail, the Dallas County Jail, the Bi-State Correctional Facility and the Texas Department of Criminal Justice, relating to the

behavior of Charles Cook during his incarceration from May 14, 1980 through October 2, 1980.

IT IS FURTHER ORDERED, that all discovery be completed within sixty days of Petitioner's receipt of this Order, that Petitioner supplement the record in this case with any relevant materials obtained during discovery within ten days of his receipt of same and that no oral depositions are authorized.

The Court reserves its decision on Petitioner's Motion for Evidentiary Hearing until completion of the discovery authorized by this Order.

SIGNED this 28th day of October 1998.

/s/ Caroline Malone
CAROLINE MALONE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal
Justice, Institutional Division,
Respondent.

RESPONDENT JOHNSON'S RESPONSE TO COURT'S ORDER DESIGNATING ISSUES FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, (hereinafter the "Director"), by and through his attorney, the Attorney General of Texas, and files this his **Response to Court's Order Designating Issues For Evidentiary Hearing**. The Director would show the Court the following:

I.

On March 7, 1996, Banks filed his federal habeas petition in this Court, alleging fourteen grounds for relief, and on September 23, 1996, the Director filed an Answer and Motion for Summary Judgment, detailing the reasons why Banks

petition must be dismissed as a matter of law. On July 7, 1998, the Director filed his oppositions to Banks' motions for discovery and evidentiary hearing, filed June 15, 1998.

On January 25, 1999, this court scheduled an evidentiary hearing for June 7-8, 1999, and ordered the parties to identify those issues "which would entitle Petitioner to relief if proven, and for which Petitioner did not receive a full and fair hearing in state court." As the Director has set forth in his Answer and Motion for Summary Judgment and his Opposition to Evidentiary Hearing, Banks has presented no issues that meet these requirements.

First, Banks is barred from pursuing further factual development of his claims in federal court. *See Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992). Banks received three state habeas evidentiary hearings over a 13 year period in which he had the opportunity to factually develop his claims. The first state habeas court conducted an evidentiary hearing on January 2, 1984. *Ex parte Banks*, Application No. 13,569. The second state habeas court conducted an evidentiary hearing on May 15, 1984. *Ex parte Banks*, 769 S.W.2d 539 (Tex Crim. App. 1989). The third state habeas court conducted an evidentiary hearing from March 29-April 1, 1993, and on July 22, 1993. *Ex parte Banks*, Application No. 13,568-03. Under *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992), a petitioner who has failed to develop the factual basis of his claims in state court is entitled to further factual development of a claim on federal habeas review only (1) upon a demonstration of cause for the failure to develop the facts and actual prejudice resulting from that failure; or (2) if the failure to hold an evidentiary hearing would result in a fundamental miscarriage of justice. *Keeney* makes clear that the "cause and prejudice" and "fundamental miscarriage" exceptions applicable here are the same as those applicable to abusive or successive petitions or to procedurally barred claims. 112 S. Ct. at 1719-20. The cause standard requires the

petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, (1991). Banks has not demonstrated how he was prevented from pursuing factual development of his claims in the three proceedings he was afforded in state court.

Furthermore, Banks' claims do not implicate the narrow exception to the cause and prejudice requirement that exists when the failure to hold a federal hearing will result in a fundamental miscarriage of justice. *Keeney v. Tamayo-Reyes*, 112 S. Ct. at 1721. A "'fundamental miscarriage' implies that the 'constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Sawyer v. Whitley*, 945 F.2d 812, 816 (5th Cir. 1991). Banks cannot prove, nor does he allege, that any further factual development would create a reasonable doubt as to his guilt. Because Banks cannot establish cause and prejudice, or that he is actually innocent, *Keeney* bars the further factual development of his claims, in this Court.

As the Director argued in his Opposition to Evidentiary Hearing, and as set forth in his Answer and Motion for Summary Judgment, one or more of the following apply to each of Banks' claims: (1) Banks has failed to allege facts entitling him to relief; (2) his allegations are conclusory and unsupported; (3) Banks' claims may easily be resolved on the basis of the state court record; (4) the state court's fact findings must be presumed correct. 28 U.S.C. § 2254(d) (pre-AEDPA). Answer at 37-60 (ineffective assistance claims); 108-12 (suppression of evidence claims). Accordingly, Banks has failed to demonstrate his entitlement to an evidentiary hearing with regard to any of his claims.

Moreover, although Banks received several evidentiary hearings in state court, he made no request to present evidence of any of the claims for which he now seeks a hearing. Nor has Banks pointed to anything in the record

indicating that the trial court prohibited him from exploring additional areas at the evidentiary hearings. Banks has thus not shown that the State prevented him from developing his claims in state court, nor has he met cause and prejudice or actual innocence exceptions of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992). Thus, the Director identifies no issues that meet the requirements for receiving a federal evidentiary hearing.

Respectfully submitted,

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Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DELMA BANKS, JR.
Petitioner,

vs. Civil Action No. 5:96-CV-353

GARY JOHNSON, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

REPLY TO COURT'S ORDER OF JANUARY 21, 1999

On January 21, 1999, the Court directed the parties to identify "issues for which the party believes additional evidence should be taken." In this pleading, Mr. Banks submits the following to comply with said order.

1. In previous filings, Mr. Banks has demonstrated his entitlement to present evidence in this proceeding on three claims, each of which implicates the essence of the adversarial system's capacity to deliver a just result. They are: (1) his Fourteenth Amendment claim that the prosecution withheld crucial exculpatory and impeaching evidence concerning at least two important state witnesses—Charles Cook and Robert Farr (herein Cook/Farr claim); (2) his Sixth and Fourteenth Amendment claims that trial and direct appeal counsel failed to provide minimally effective assistance at trial and on direct appeal, and (3) his Fourteenth Amendment discrimination claim concerning the Bowie County district attorney's office longtime practice of peremptorily removing nearly all African-American jurors from felony cases.[1]

[1] *See* Motion for Evidentiary Hearing & Motion for Discovery filed in June, 1998.

2. Director Johnson has responded that as to each of the above claims Mr. Banks is not entitled to conduct discovery or present evidence before the Court.[2]

3. Mr. Banks takes this opportunity to explain why the Director is mistaken, and why he indeed is entitled to conduct discovery on the prosecution misconduct claim, and present evidence in support of each of these meritorious claims.

I. The Cook/Farr Claim

a. Relevant Procedural History

1. Trial Proceedings: Repeated Assurances of No Deals or Impeachment Material

4. As the prosecutors prepared their case for trial, it had to have struck them that they had serious problems at each phase of trial. They had no custodial confession to present, nor any eyewitness who would say that Mr. Banks fired the fatal shots that killed Richard Whitehead. Nor did they have a motive; indeed, their evidence would show that during the hours leading up to the shooting, Mr. Banks and Mr. Whitehead were behaving as teenagers and young adults typically do all over Texas and throughout the country on many nights of the year. They purchased some beer, and rode around their home town accompanied by Mr. Whitehead's date. By all accounts, there were no disputes; indeed everyone got along just fine.

5. Moreover, when Mr. Whitehead's body was found three days later in the park, the fact that his watch had not been removed and money remained in his pocket undercut the state's trial theory that he was killed during a robbery. Nor did the state possess nor could it account for the whereabouts of Mr. Whitehead's car, the only item it was prepared to ask the jury to find was stolen.

[2] *See* Respondent Johnson's Response, filed July 7, 1998.

6. With regard to its case for the death penalty, the prosecutors' evidence was equally wanting. Mr. Banks had no prior conviction for any crime. Nor did the state possess any psychiatric evidence that Mr. Banks was a sociopath or otherwise dangerous. It had but two recent incidents, one involving a brief fight between Mr. Banks and his common-law brother-in-law, Vetrano Jefferson, and more damaging evidence from another common-law brother-in-law, Robert Farr, concerning boasts about wanting to commit armed robberies. In short, the state was in no position to show that Mr. Banks was Ted Bundy, or that he posed a danger in the future or deserved execution.

7. Yet the prosecutors' most daunting challenge was to overcome serious credibility problems with its key witnesses. While they planned to call a dozen or so witnesses to the stand, most were bit players compared to Charles Cook and Robert Farr. Charles Cook's testimony—that he met Mr. Banks in Dallas on the morning after Mr. Whitehead was likely shot, that Mr. Banks was driving a car that resembled Mr. Whitehead's, and that over the course of the following three days, Mr. Banks told Cook that he killed Mr. Whitehead, and loaned Mr. Cook the alleged murder weapon and Mr. Whitehead's car—was the centerpiece of the state's case. As District Attorney Raffaelli would later repeatedly tell the jurors in his opening statement, "I think the testimony of Charles Cook is critical, . . ." 9 R 2129. Mr. Farr's testimony—that Mr. Banks initiated a subsequent trip to Dallas with Farr and another common-law brother-in-law, Marcus Jefferson, one week later so that Mr. Banks could retrieve his pistol from Mr. Cook so that he could commit armed robberies and, if necessary, kill during those crimes—was the linchpin of its case for the death penalty as, the state would argue, it demonstrated that Mr. Banks would likely grievously harm, or kill again.

8. The prosecutors had good reason to wonder whether jurors would believe Cook. He was a drug user and twice convicted felon who was facing still another felony prosecution in Dallas for arson. Moreover, habitual offender papers were filed in that case one month prior to Mr. Banks' trial which meant, upon conviction, that he faced a very long prison sentence. Surely some members of the jury might seriously wonder whether Cook was testifying honestly, or whether he was shading the truth to please Bowie County authorities in the hope that they would prevail upon the Dallas authorities to dismiss the arson charge.

9. Farr had similar credibility warts. He too had a drug habit. As with Cook, some jurors might wonder whether he was telling the truth or was falsely aiding the state to help himself.

10. Prior to trial, prosecutors took the initiative and informed Mr. Banks and counsel that the state would provide all discoverable material without requiring the defense to file motions. In a letter to counsel dated July 7, 1980, then assistant district attorney Charles Attaway advised counsel: "we will, without necessity of motions provide you with all discovery to which you are entitled." [3] Existing law required the prosecutors to reveal to the defense material exculpatory and impeaching evidence as to both guilt and penalty in prosecution and police investigative files. *See Brady v. Maryland*, 373 U.S. 83 (1963).

11. Prior to trial, with the exception of Mr. Cook's rap sheet, prosecutors turned over no information of an exculpatory nature on any state witness.

12. During trial, Mr. Banks sought to show jurors that Mr. Cook's and Mr. Farr's incriminating testimony was not truthful. He attempted to establish that Cook had made a deal

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[3] Trial counsel nevertheless filed a comprehensive motion for discovery on August 15, 1980. 1 R 24.

for his highly prejudicial and untruthful testimony to ensure that his arson charge and habitual offender papers would be dismissed shortly after trial. *See* 2145-2158. In his testimony, Mr. Cook denied speaking with the prosecutors prior to trial, and that he had made a deal with them for his testimony. *Id.* Both prosecutors' assured the court and jurors that Mr. Cook's testimony was truthful and was not influenced by any deal. Mr. Raffaelli stated "[j]ust for the record, Judge, there have been no deals." 9 R 2317. Shortly thereafter, Mr. Elliott confirmed with regard to Mr. Cook that "there is no deal." *Id.* at 2320.

13. When Mr. Farr returned to the witness stand during the penalty phase, he denied that he had acted as an informant for investigator Huff during Huffs pre-arrest surveillance of Mr. Banks. He also denied that authorities had conferred benefits upon him in exchange for his cooperation, even though he was not prosecuted for drug paraphernalia he possessed at the time of Mr. Banks' arrest. 10 R 2503-08. Moreover, he testified that he did not initiate the trip to Dallas that led to Mr. Banks' arrest. The prosecution acquiesced in this testimony and gave no indication to anyone that it was not truthful.

14. In closing arguments, the prosecutors repeatedly felt the need to assure jurors that witnesses Cook and Farr should be believed, and repeatedly—and improperly—vouched for their credibility. In his opening summation at the guilt phase, Mr. Elliott told the jury that no state witness had reason to falsely testify, 10 R 2448, and that "Charles Cook did not hide anything from you," "he didn't hide a thing from you," "Charles Cook brought you absolute truth" *Id,* at 2450. Acknowledging that jurors might conclude that Cook's nervous witness stand demeanor showed dishonesty, Mr. Elliott again assured the jury that "Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth." *Id,* at 2453. And once again, he exclaimed

that "Charles Cook did not hide anything from you," and more broadly declared "we didn't hide anything with regard to any of these witnesses." *Id.*

15. During penalty phase argument, the prosecutors returned to these themes. Mr. Raffaelli pointedly assured the jury that Robert Farr "has been open and honest with you in every way." *Id.*, at 2579.

16. On September 30, 1980, Mr. Banks was sentenced to death. Mr. Cook's arson charge was promptly and summarily dismissed by Dallas authorities on October 2, 1980.

17. Thus, it is difficult to overstate the importance to the state's case at each phase of trial that jurors perceive Charles Cook and Robert Farr as credible and that their testimony was the truth. Surely if the state withheld evidence that casts either witnesses' testimony in a different light, confidence in the jury's verdicts crumbles.

2. *State Post-Conviction Proceedings: Some Evidence of Withheld Exculpatory and Impeaching Material Appears But State Courts Summarily Reject Claim.*

18. During state habeas proceedings, Mr. Banks had no reason to doubt the prosecutor's trial assurances that neither Cook nor Farr testified falsely. But in January, 1992, he came upon evidence for the first time that suggested that his trial had been rendered fundamentally unfair by the state's suppression of exculpatory material. In an interview conducted by a volunteer investigator temporarily aiding Mr. Banks who was then facing a rapidly approaching execution date, Charles Cook stated that he indeed had testified against Mr. Banks pursuant to an agreement that if he did so, the pending arson charge and habitual offender papers would be dismissed. *See* Exhibit D to Petition for Writ of Habeas Corpus filed January 13, 1992 in the 102nd District Court of Bowie County, Texas. However, fearing reprisals, Mr. Cook refused to again meet

with or speak to Mr. Banks' representatives, and thus refused to sign any affidavit.

19. Mr. Banks affirmatively sought the aid of the court to enable him, *inter alia*, to fully develop the facts relating to Mr. Cook's January, 1992 declarations. In October, 1992, Mr. Banks, moved the court for funds so that he could, *inter alia*, retain the services of an investigator. He stated: "Mr. Banks needs the aid of an investigator in order to develop fully his allegation that the Bowie County District Attorney's office had not disclosed that a favorable deal had been arranged for Charles "Two-Two" Cook, the State's chief witness, in exchange for his testimony against Mr. Banks." *See* Motion for Investigative and Court Analyst Funds, filed October 1, 1992 pp. 1-2.

20. In its answer to this claim, the Director denied that the state had made any deal with Mr. Cook for its testimony. *See* Respondent's October 5, 1992 Original Answer at p. 5. The state supported this assertion with a bare two sentence declaration from investigator Willie Huff in which he stated: "Charles Cook was never a suspect in the murder of Richard Whitehead," and "[t]here was no deal, secret or otherwise, with Charles Cook." *See* Exhibit I-A to Respondent's Original Answer. Prosecutor Elliott provided a similarly laconic denial: "1. I am aware of all facts concerning the investigation and prosecution of Delma Banks. . . . 3. There was no secret agreement with Charles Cook in exchange for his testimony. 4. I am unaware Charles Cook was ever considered a suspect in the murder of Richard Whitehead." *See* Exhibit I-B to Respondent's Original Answer.

21. The court never acted upon Mr. Banks' funds request, and never provided any monies for an investigator so that he could pursue this claim or any other suggestion that exculpatory or impeaching evidence in the state's possession had in fact been suppressed.

22. Mr. Banks also charged in his petition that the state had withheld impeaching information concerning Mr. Cook and Mr. Farr, and regarding Mr. Farr, claimed the state failed to disclose that he was a police informant and had orchestrated the trip to Dallas that culminated in Mr. Banks arrest. The state never addressed these allegations in its responding papers. No evidentiary hearing was held on this claim.

23. In its February 22, 1993 Findings of Fact and Conclusions of Law, the habeas judge found, based upon the sparse record, that "there was no agreement between the State and the witness Charles Cook." It made no other findings relevant to these matters. Nor did the Texas Court of Criminal Appeals make additional findings.

b. Current Federal Habeas Proceedings

24. In his petition for writ of habeas corpus, Mr. Banks has alleged that Mr. Cook and Mr. Farr's testimony was not truthful in material respects, that Mr. Cook lied about not having a deal in his arson case, and that Mr. Farr lied in denying he was an informant in this case and that he did not set Mr. Banks up to go to Dallas, and that the prosecutors failed to correct these misrepresentations before the jury. Because the state court did not provide a hearing on these allegations, Mr. Banks has requested an evidentiary hearing and sought leave of court to conduct necessary discovery. The Director has responded that Mr. Banks is not entitled to either discovery or a hearing because the state court adequately resolved these issues, and because his claims are too speculative.

25. Mr. Banks does not understand the Director to oppose either discovery or an evidentiary hearing should he produce specific evidence that suggests this claim has merit. Mr. Banks now possesses such evidence. Indeed, the evidence Mr. Banks submits with this pleading in support of this claim

compels both an order granting leave to conduct discovery and an evidentiary hearing.

26. Attached to this pleading are the affidavits of five state witnesses: Charles Cook, Robert Farr, Carol Cook, Marcus Jefferson and Vetrano Jefferson. In considerable detail, and in sharp contrast to the summary and unadorned affidavits submitted by the Director in state court, each witness provides relevant and detailed evidence that leaves little doubt that state misconduct deprived the jury of critical material concerning Mr. Cook and Mr. Farr's credibility. The content of each is summarized briefly below:

a. Declaration of Charles Cook: Mr. Cook puts to rest the issue of whether he testified pursuant to an understanding that the pending arson charge and habitual offender papers would be dismissed upon him testifying against Mr. Banks in a manner satisfactory to Bowie County authorities. Such an agreement in fact existed. Moreover, he affirms that much of the most prejudicial testimony he offered at trial was not the truth and that much of this testimony was furnished to him by authorities. This declaration, without more, establishes good cause for discovery and an evidentiary hearing.[4]

b. Declaration of Robert Farr: Mr. Farr similarly puts to rest the issue of whether he acted as an informant and agent for investigator Huff in this case. He plainly states that he did so, and that he was paid by investigator Huff for his services. Moreover, he confirms that crucial, material portions of his trial testimony are untrue.[5] This declaration, without more, establishes good cause for discovery and an evidentiary hearing.

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[4] Unlike at trial, Mr. Cook has absolutely nothing to gain by submitting the affixed affidavit.

[5] Like Mr. Cook, Mr. Farr has nothing to gain by submitted this affidavit.

c. Declaration of Carol Cook: Ms. Cook confirms that, like her brother Charles Cook, she was told by authorities to testify about events she knew to be untrue. For example, while she recalled the car that she saw Mr. Cook and Mr. Banks ride in as being red, not green, she asserts that she was told by authorities to testify that the car was green.

d. Declaration of Marcus Jefferson: Mr. Jefferson confirms Mr. Farr's present account that it was Farr's idea, not Mr. Banks', to drive to Dallas to obtain a pistol. Moreover, he confirms that Mr. Banks made no statements indicating that he wanted a weapon to commit robberies.

e. Declaration of Vetrano Jefferson: Mr. Jefferson confirms that his penalty phase testimony was seriously misleading in that he, rather than Mr. Banks, was to blame for the fight they had that the state used to show Mr. Banks would likely be a danger in the future. He also confirms that investigator Huff used zealous tactics to bring him to court, and that Huff suggested that he give testimony that was not truthful.

27. In the wake of this new evidence, Mr. Banks submits that he is entitled to conduct discovery, and thereafter, to an evidentiary hearing on his prosecution misconduct claim. *Townsend v. Sain, supra; Bracy v. Gramley*, 117 S.Ct. 1517 (1997). The state is entirely responsibility for Mr. Banks' inability to present these facts in the state courts first because it suppressed them at trial and then by steadfastly denying their existence in later proceedings. Mr. Banks is entitled to and thus seeks leave to conduct the following discovery:

a. Deposition of Willie Huff

b. Deposition of James Elliott

c. Production of the following files:

- Investigator Huff's full and complete file for this case

- Investigator Huff's Bowie County personnel file
- Any law enforcement file possessing information that Huff has provided untruthful evidence in other cases, or was investigated for violation of state and/or federal law
- Any law enforcement file that possesses information concerning Robert Farr's informant status and career
- Investigator Huff's travel records from April 11 through October 2, 1980, and/or Bowie County sheriff department or other law enforcement files containing said information
- Bowie County District Attorney's office entire prosecution file for this case
- Any Bowie County District Attorney's file, or other law enforcement file, possessing information on Robert Farr's status and role as an informant in this case
- Any Bowie County District Attorney's file or Dallas County District Attorney's file possessing information of discussions between Dallas County and Bowie County authorities concerning Charles Cook and his participation as a witness at Mr. Banks' trial

Mr. Banks requests that the Court allow him 60 days to conduct such discovery, and that all requested files, papers, and documents be provided within 30 days, and that any necessary depositions take place within 30 days after receipt of such discovery. Mr. Banks reserves the right to request additional discovery depending upon what he learns from review of the requested files and testimony at the depositions. Mr. Banks will make every effort to complete all discovery by May 26, 1999 so that a June 7 & 8 evidentiary hearing may go on without delay.

II. The Ineffectiveness Claims

a. Relevant Procedural History

1. State Post-Conviction Proceedings: No Hearing or Adequate Resolution of Sharp Factual Disputes Between the Parties

28. In the most recent state post-conviction proceedings, Mr. Banks pleaded a comprehensive claim of trial counsel's ineffectiveness and alleged several unreasonable omissions by direct appeal counsel. In support of these allegations, Mr. Banks submitted by affidavit a considerable array of evidence which tended to show that failure to adequately investigate and prepare for either phase of trial, in combination with several errors during the trial itself resulted in Mr. Banks not receiving the type of legal representation the Constitution requires he receive in this capital proceeding.[6] Similarly, he offered testimonial support for his claim that direct appeal counsel's failure to raise several meritorious issues showed ineffective representation in that legal venue as well. In rebuttal, the Director filed with his answer the affidavit of the defense investigator, and referred to an affidavit from defense counsel Cooksey that was filed only months later and in a significantly different form.[7]

29. It is fair to say that Mr. Banks' claim, if found proven by credible evidence, would establish successful ineffective assistance claims, and that the parties sharp disagreement on the facts require a hearing and determination by the Court of which party has the better case.

30. The state court held no hearing, issued no findings, and concluded only that (1) "counsel for Appellant at trial did give the Appellant effective assistance of counsel throughout

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[6] See Exhibits to Petition for Writ of Habeas Corpus filed January 13, 1992.

[7] See Exhibits to Answer filed October 5, 1992.

all stages of the trial proceedings, including voir dire and pre-trial," and (2) "the Court concludes as a matter of law that Applicant did receive effective assistance of counsel on appeal." Feb. 22, 1993 Findings of Fact and Conclusions of Law at pp. 3, 7.

31. While the state court is free to dismiss fact-bound claims such as the ones pleaded by Mr. Banks without any hearing or findings, such summary resolution does not prohibit this Court from now hearing the evidence, making findings of fact, and reaching a conclusion that differs from the state courts.

b. Mr. Banks is Entitled to a Hearing

1. The State Court's Failure to Make any Findings on This Claim Mandates a Federal Hearing

32. This Court must hold an evidentiary hearing on these claims because the state court's failure to make fact-findings leaves this Court with no basis upon which to make a reliable determination of these federal questions. When a federal habeas court reviews a claim that has been presented to the state courts, the federal court must perform a *de novo* review of the state court's legal resolution of that claim. "It is the duty of the district court . . . to review *de novo* the legal conclusions reached on the basis of the facts." *Blackmon v. Scott*, 22 F.3d 560, 567 (5th Cir. 1994); *May v. Collins*, 955 F.2d 299, 315 (5th Cir. 1992); *Buxton v. Lynaugh*, 879 F.2d 140, 147 (5th Cir. 1989).

33. Typically, such review would be based on the factual findings made by the state court, which must be presumed to be correct. *See* former 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U. S. 539, 546-47 (1981). However, where the state court develops no factual record upon which the federal habeas court can base its legal conclusion, the federal habeas court must hold an evidentiary hearing. *See e.g., Goodwin v.*

Johnson, 132 F.3d 162, 184-85 (5th Cir. 1998); *Blackmon*, 22 F.3d at 567. In *Blackmon*, the court of appeals found that where the state courts entered no findings relating to a petitioner's Sixth Amendment *Massiah* claim, the district court could not deny relief without benefit of an evidentiary hearing. *Id.* The court concluded that the factual findings necessary to determine whether state agents had deliberately attempted to elicit incriminating statements from the petitioner could not be made in the absence of an evidentiary hearing. *Id.*

34. Similarly, in *Goodwin*, the court stated that "[b]ecause the state courts made no fact-finding on the [relevant] issue, they did not provide [petitioner] with a full and fair hearing for its resolution." The Court described the general principle that "'[w]hen the state court did not resolve a fact issue that would entitle the petitioner to relief if resolved in his favor, the petitioner is entitled to an evidentiary hearing on this issue. *Id.* at 183. The court recognized this principle in *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994), where it noted that "ordinarily it would remand this case to the district court for a hearing [on the disputed issues] . . . because no finding was made as to that issue." *See also Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996)(finding that petition was entitled to evidentiary hearing where state court's findings of fact were not entitled to presumption of correctness and petitioner's allegations, if true, would have entitled her to relief).

35. Although Mr. Banks presented numerous allegations and supporting evidence before the state court in support of his ineffectiveness claims, the state court made no fact findings. It made only the broad, sweeping legal determineation that neither counsel's services fell below constitutional standards. But the state court's legal conclusion is not entitled to any presumption of correctness. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995)(finding that the effectiveness of

counsel is a legal question and not to be given a presumption of correctness under former 28 U.S.C. § 2254(d)). The state court therefore made no express findings that this Court may rely on in determining whether Mr. Banks' counsel satisfied constitutional requirements:

36. Moreover, the court may not rely on any implicit factual findings that were arguably necessary to the state habeas court's ultimate conclusion. The court of appeals has made clear that a federal habeas court may give a presumption of correctness to implicit findings only in the most limited circumstances. In *Salazar v. Johnson*, 96 F.3d 789 (5th Cir.1996), for example, the district court was reversed for relying upon an implicit finding. Salazar asserted in an affidavit that his counsel failed to inform him of his appellate rights. *Id.*, at 791. The assertion was not disputed by the affidavit presented by respondents. "Nevertheless, the district court states that the state court 'implicitly found' that Salazar was informed of his appellate rights." *Id.*, at 792. The Fifth Circuit found that attaching a presumption of correctness to this supposed implicit finding was erroneous and remanded the case for a factual finding on this issue. *Id.*

37. In *Armstead v. Scott*, 37 F.3d 202, 208, the state court dismissed a petitioner's ineffectiveness claim on the grounds that the affidavit filed by the petitioner's trial counsel, which the state court found to be credible, denied each of the factual allegation in the petitioner's affidavit describing the basis of the claim. The affidavit from trial counsel, however, did not address the issues of a false promise made by trial counsel—an issue raised by petitioner in his affidavit. Accordingly, when the state court stated that it found that trial counsel's affidavit was correct, no factual findings were made regarding the false promise. Even though the ultimate conclusion of the state court may have implied a finding regarding the false promise, the court of appeals concluded there was no finding to which a federal court could defer.

38. In those instances where federal courts found a state court's legal conclusion may form the basis for findings of fact, the state court's ruling addressed a discrete issue and the factual basis for the ruling was straightforward and clear. *See Goodwin*, 132 F.3d at 184 n.16 (collecting cases). This is not such a case. The factual basis for Mr. Banks' claims are extensive. The state court's one sentence legal conclusion simply does not make it possible to reconstruct any unexpressed findings of fact. *See Townsend v. Sain*, 372 U.S. 293, 314 (1963).

39. The state court therefore produced nothing to which this Court can defer as it approaches its task of reaching its independent determination regarding the ineffective assistance of counsel claims.

c. *The State Courts' Failure to Afford Mr. Banks a Full & Fair Hearing Mandates an Evidentiary Hearing*

40. The Court must hold an evidentiary hearing because the "hearing" held in the state proceeding was wholly inadequate. It is well established that "[t]he opportunity for an evidentiary hearing in a federal habeas proceeding is mandatory only where there is a factual dispute which, if resolved in the petitioner's favor, would entitled the petitioner to relief and the petitioner has not received a full and fair hearing in state court." *East v. Scott*, 55 F.3d 996, 1004 (5th Cir. 1995); *Goodwin v. Johnson*, 132 F.3d 162, 178 (5th Cir. 1998); *Monroya v. Scott*, 65 F.3d 405, 417 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d 333, 346 (5th Cir. 1996); *Wiley v. Puckett*, 969 F.2d 86, 98 (5th Cir. 1992)(noting that this standard applies equally to ineffective assistance of counsel claims). A "full and fair" evidentiary hearing occurs were the material facts—those facts crucial to a fair, rounded consideration of petitioner's claim—are adequately developed. *Townsend*, 372 U.S. at 312-13.

41. Mr. Banks has already discussed one sufficient reason for concluding an evidentiary hearing is necessary: the absence of any factfinding. Other equally sufficient ones exist as well.

42. The "hearing" that Mr. Banks was affording allowed for no presentation of live testimony, but only submission of affidavits. While "paper" hearing may provide for the adequate airing of facts and their reliable consideration in some cases, that is not always the case. Thus, "it is necessary to examine in each case whether [such a hearing] is appropriate to the resolution of the factual disputes underlying the petitioner's claims." *May*, 955 F.2d at 312. The court of appeals has found on numerous occasions that state factfinding based solely on competing affidavits should not be afforded a presumption of correctness because such a hearing is not full and fair.

43. The circumstances of this case demonstrate clearly the absence of a full and fair adjudication of the claims. There is no doubt that Mr. Banks presented considerable evidence in support of his claim; this quantum of proof contrasted sharply with the two affidavits submitted by the Director. Mr. Banks' submissions addressed numerous issues not dealt with at all by the Director's, and in some areas, disputed sharply respondent's representations. Credibility issues were raised, but none were resolved by the state court. Moreover, the Director relied in his answer on an expansive affidavit he allegedly presented to trial counsel to sign, but which counsel ultimately refused to execute.

44. These circumstances—considerable proof offered by Mr. Banks and far less offered by the Director—makes this case like *Netherly v. Collins*, 993 F.2d 1154, where the court of appeals found a paper hearing to be inadequate. There, the petitioner claimed that the trial judge was tainted by his failure to disclose a close personal relationship with the deceased victim. The trial judge submitted to the state habeas

court an affidavit stating that he was not personally acquainted with the victim. The petitioner submitted an affidavit from a friend who claimed to have heard the judge profess a friendship with the victim. The state court conducted no evidentiary hearing and adopted the state's proposed findings of fact. The court of appeals determined these findings were not entitled to a presumption of correctness because the findings "did not follow on the heels of a full and fair hearing." The court found it significant that the state habeas judge was not the trial judge and that petitioner's version of events was not so facially insubstantial as to render a hearing a mere gratuitous formality.

45. Moreover, this case is distinct from those where a paper hearing was found to be adequate. Many concern issues in which the proffered evidence was uncontradicted. For example, in *Uresti v. Lynaugh*, 821 F2d 1099 (5th Cir. 1987), the petitioner submitted no evidence relevant to his claim of ineffective assistance of counsel to the state habeas court and the trial counsel's affidavit directly addressing the relevant issues stood uncontradicted. Clearly, no factual dispute existed that required resolution through a live hearing. Similarly, in *Evans v. McCotter*, 805 F.2d 1210 (5th Cir. 1986), in the context of a present insanity claim, the state habeas court was presented with five detailed affidavits from the state concerning petitioner's health, and only one general and conclusory one from petitioner's sister asserting he was insane and incompetent. Again, the petitioner's evidence failed to raise a material dispute regarding petitioner's insanity. As a result, the required factual findings did not suffer from the absence of an actual evidentiary hearing. In fact, the court found that petitioner's affidavit was too conclusory to even raise a fact question as to his sanity and only, alternatively found that the procedure was adequate. Concerning ineffectiveness claims, in *Smith* v. *Estelle*, 711 F.2d 677 (5th Cir. 1983), the court determined that a paper

hearing was adequate but again only because the petitioner's submissions failed to raise a significant factual dispute.

46. Furthermore, paper hearings have been found inadequate where a state court finds in favor of a party whose evidence fails to address necessary issues. *See Salazar*, 96 F.3d at 792. There the court found, when reviewing an ineffective assistance of counsel claim, that the factual findings in favor of the warden that were not supported by the record could not be afforded a presumption of correctness. As a result, the case was remanded to the district court for the purpose of making relevant fact findings.

47. Such obvious limitations on fact finding from paper records has been noted by the Supreme Court. In *Cabana v. Bullock*, 474 U.S. 376, 388 n.5, the Court found that an issue of whether the defendant possessed the requisite intent to kill would often turn on credibility determinations that could be reliably made only after a live hearing.

48. For all of these reasons, the "paper" hearing afforded Mr. Banks' meritorious ineffective assistance of counsel claims in state court failed to adequately resolves these issues. Thus a full and fair resolution is warranted in this Court.

III. The Swain Claim.

a. Relevant Procedural History

1. State post-conviction hearing: petitioner was repeatedly denied necessary funds to confirm race of venirepersons and factfinder was neither neutral nor detached

49. Mr. Banks pleaded claims of systematic exclusion of African-Americans from jury service in Bowie County twice—in his first and then in his third state habeas petition. After he submitted a large volume of unrebutted evidence in support of this claim in the third proceeding—and after that court refused repeatedly to rule on motions for discovery and requests for funds for expert and investigative assistance—the trial court denied his request for relief. Thereafter, the Court

of Criminal Appeals remanded the case back to the trial court for an evidentiary hearing on this issue. Prior to that hearing, Mr. Banks asked the trial court to recuse himself; the court refused to do so. Mr. Banks also reasserted motions for discovery and for funds. Again, the court made no funds available to Mr. Banks for expert and investigative services, but did *grant* the state's motion for funds for its own statistical expert.

50. Thereafter, in ruling on this claim, the court found no meritorious *Swain* claim, in part because it held that the method by which Mr. Banks determined the race of numerous venirepersons was not sufficiently reliable. Lacking funds solely due to the court's refusal to act on his request for those funds, Mr. Banks was forced to confirm racial identity by consultation with longtime residents of Bowie County. In the court's words, "the following facts erode the accuracy and reliability of the statistical data; . . . blacks were identified on veniresheets by witnessses who gave sincere, but unscientific guesses at racial identification . . . " July 22, 1993 Findings of Fact and Conclusions of Law, para. 28.

2. Current posture of claim

51. Mr. Banks is now in a position to submit evidence that will establish beyond doubt the race of these venireperson. This evidence will confirm that the racial identification evidence submitted in state court is correct, and will demonstrate that the data underlying this serious claim is solid and reliable. It will thus remove any doubt about the reliability of the stark pattern of peremptory striking that Mr. Banks submits establishes a meritorious claim under *Swain v. Alabama*, 380 U.S. 202 (1965).

52. Mr. Banks seeks leave pursuant to Rule 7 of the Rules Governing Section 2254 Cases to supplement the record with two affidavits: one from the paralegal who performed the exacting task of actually confirming the race of each relevant venireperson, and from Mr. Banks' statistical expert from the

state court proceeding. Dr. Kent Tedin, who will affirm that the new data confirms the accuracy of the data upon which he based his conclusions at the state hearing. One purpose of Rule 7 is to provide a vehicle for the submission of evidence that the parties find does not require adversarial testing. Should the Director object to this procedure, Mr. Banks is prepared to call both witnesses at an evidentiary hearing.

WHEREFORE, for the reasons given above, and for others apparent to the Court, Mr. Banks prays that the Court grant his motion for discovery and for an evidentiary hearing as modified in this submission.

Respectfully submitted,

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Delma Banks, Jr.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,
vs.
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

Exhibits to Reply

Declaration of Charles E. Cook

Declaration of Robert Farr

Declaration of Carol N. Cook

Declaration of Marcus Jefferson

Declaration of Vetrano Jefferson

County of Dallas
State of Texas

Declaration of Charles E. Cook

1. My name is Charles E. Cook. I am more than 18 years of age, and give this declaration freely and voluntarily. I declare that the contents of this statement are true.

2. In September of 1980, I testified as a state's witness in the case of *State of Texas v. Delma Banks*, (No. 80-F-86), a capital case that was tried in Bowie County, Texas. Prior to the trial, I had no contact with representatives of Mr. Banks but spoke extensively and often with the trial prosecutors—Mr. Raffaelli and Mr. Elliott—as well as with Bowie County Deputy Sheriff Willie Huff and other members of the sheriff's department. Mr. Huff served as the chief investigator on this case. At the conclusion of the trial, Mr. Banks was found guilty of capital murder and was sentenced to death.

3. In the years since this case, I have on several occasions been approached by representatives of Mr. Banks who have wished to interview me about my knowledge of the case and my trial testimony. On all but one of these occasions—until now—I have refused to say a word. The one exception was during January, 1992, when I spoke for a few hours with an investigator from what I understood to be the Texas Resource Center. After that conversation, I refused to again speak with that person, and also refused to sign an affidavit that had been prepared for my signature.

4. In early July, 1998, I was again approached by a representative of Mr. Banks, a Dallas-based investigator named Ben Leonard. At the time, I was an inmate at the Hutchins Unit correctional facility in Hutchins County, Texas. Mr. Leonard indicated that he wished to speak to me about Mr. Banks' case, and on this occasion, I agreed to talk with him about it in general terms. Mr. Leonard impressed me

as sincere and honest, and I informed that I would consider meeting again with him and other representatives of Mr. Banks.

5. After Mr. Leonard's visit, I thought long and hard about whether I wanted to speak in more detail about this case. I finally agreed to do so after I concluded I could no longer conceal that much of my trial testimony was not true. It was a scripted event that was forced upon me by Deputy Sheriff Huff and the trial prosecutors. During the months leading up to trial, I was facing a felony charge of arson, and the state had filed habitual offender papers, which meant that upon conviction I would receive a life without parole sentence. Mr. Huff and the others made it very clear to me on numerous occasions that I would receive such a sentence if I did not testify against Mr. Banks as they wanted me to. Given this choice, I agreed to testify falsely to certain events and matters in exchange for dismissal of the pending arson charge and habitual offender papers. It is my intent in this declaration, once and for all, to set the record straight.

6. On April 12, 1980, I met Delma Banks in front of my house in Dallas. Prior to this time, I had never before met Mr. Banks. He told me that he had just arrived in Dallas, was thinking about moving here, and asked if I could aid him in finding a place to stay. As this was a Saturday, and I did not have to be at work, I agreed to assist him. I spent much of this day with Mr. Banks, and all of the following Sunday. Mr. Banks remained in Dallas on Monday, and after work, I accompanied him to the bus station whereupon he took a bus back to Texarkana.

7. In the early morning hours of April 24, 1980, I was at my grandparents home, and I heard a knock at the door. A tall dark guy in his thirties asked "do you have the pistol." I told him that I didn't know anything about a gun. At the same time, I heard a helicopter in the sky above. The man left. Shortly thereafter, several plainclothes police rushed into the

house shouting "where is the fucking gun?" One of these officers was Willie Huff. This was the first time that I met Huff. I spoke to the officers briefly upstairs so that my grandparents would not be disturbed, and shortly thereafter, the police took Rita and I downtown for questioning. Once there, Rita and I sat with Deputy Huff and another investigator, and Huff explained that Delma Banks had killed a young white man in Texarkana. He was exited and agitated, and used harsh language. For example, he told me "nigger, you had better tell us the truth or it is your ass." He accused me of helping to get rid of the murder weapon, and that I could be charged as an accessory to murder. He also accused me of selling the car that he said Delma took from the victim, and said "we know you sold the car. We are going to take your black ass to jail if you don't tell us to who." He made it very clear that cooperation was my best and only option. His demeanor and blunt language scared me nearly to death. I had twice been in the penitentiary, and knew if I returned that I would be there for a very long time.

8. While at the station, I gave a statement- that was incomplete and inaccurate in numerous respects. I did so only because I was terrified of Huff, felt I was about to be charged with this crime, and wanted to please him. Shortly thereafter, he drove Rita and I back to my grandparents home, and he and I went to my neighbor Benny Lee Jones' house to get the gun. Jones gave us a gun that was a .25 automatic. I do not know much about guns, and thus don't know whether this is in fact the gun that I had obtained from Delma and later sold to Jones.

9. Three weeks later, in the middle of May, I was locked up in Dallas on the arson charge. That charge originated from a misunderstanding with my sister. She was living with a man who was regularly beating her; in order to get him to stop, I lit the back door on fire. Shortly afterwards, my sister filed an affidavit which informed authorities that she did not wish to

press these charges further. This affidavit was ignored and I remained in jail.

10. Shortly after my incarceration, I was taken by Deputy Huff and another Texarkana law enforcement official to the Bowie County jail for the first of several pretrial practice sessions. Huff and the two trial prosecutors were present. They made it very clear that this case was very important, that I would testify as they wanted me to, and that I would spend the rest of my life in prison if I did not. They repeatedly told me how to say things, and insisted repeatedly that I testify about events that were not true. For example, Huff and the others told me I had to say that Delma "wanted to know what it was like to kill a white boy." I was also told to say that Delma drove over the victim's legs with the car after the shooting. Delma never said these things to me. Moreover, Delma never gave me any details about the shooting. Often during these sessions, Huff and others would scream at me, and make it very clear that I would say things the way they wanted it said or I would spend the rest of my life in prison. I can still hear them telling me if I complained that something that they suggested I say was not true, "yes it is nigger, that is what you are going to say."

11. It is my recollection that I participated in three or four of these practice sessions prior to the real trial. On each occasion, Deputy Huff and other man would take me out of the Dallas County jail and take me to Bowie County. I would stay in Bowie County for a few days, and Huff would return me to the Dallas jail after the session. On one of these occasions, Huff gave me beer on the return trip; on other occasions, he gave me $10 or $20 dollars at the end of the trip.

12. In August, I learned that habitual offender papers were filed against me in the arson case. A few days afterwards, Huff came to Dallas and told me about these papers. He made it very clear that the arson charge and habitual offender

papers would disappear if and only if I testified as he wanted at the trial. This filing made it crystal clear to me that if I did not do as they wished, it was a certainty that I would never again be a free man.

13. Just prior to trial in September, Huff informed me that several members of my family and I would travel to Texarkana for the trial, and that we would stay in a motel until the trial's completion. Huff said we would stay at a nice motel, and that I would be able to stay with Rita so that I could—in his words—"get some pussy." In exchange, he said, "you have got to do something for us." He said I had to say that Delma had killed the white boy for the hell of it. On this same day, Huff got me out of the Dallas jail, drove me home, and allowed me to have a conjugal visit with Rita.

14. When it came time to go to Texarkana, my family and I rode in a caravan. When we arrived at the motel, my family entered the motel, but Huff stopped me and said I would be staying at the jail. I was angry but Huff said we had to make it look right. I was held at the jail for four or five days. On each day, Huff got me and took me to the motel so I could see my family and have conjugal visits with Rita. He would stand outside Rita's room while she and I had sex. Huff also brought me food daily because I refused to eat the jail food.

15. At the trial, I did not testify truthfully. Instead, I testified consistently with the script that I had been drilled on to follow. Among other things, I did not testify truthfully when I said (1) that I saw blood on Delma's leg on the Saturday when we first met; (2) that Delma had said on Saturday morning that he had harmed a white boy; (3) that Delma gave a description of how the victim was shot and that he had run over the victim's legs with the car; (4) that Delma wanted to know what it was like to kill a white person, and (5) that he wanted to kill someone for the hell of it. I testified to these and other matters that were not the truth only because I was under extreme duress from Deputy Huff and the

prosecutors. I had to choose between the truth and freedom, and I chose freedom.

16. Immediately after the trial concluded, Deputy Huff, ushered me out of the courthouse. My family and I left for Dallas shortly thereafter; I rode alone with Huff. To my relief, Huff was true to his word. He took me directly to the Dallas County Jail, and on October 2, 1980, the day after Delma's trial concluded, the arson charge was dropped and I was released a free man.

17. The last time I saw-Deputy Huff was when he dropped me off in Dallas after the trial. He reached into his pocket and gave me $50. He told me "you know what will happen to you if you tell people what really happened." This was a threat and warning that I would be in danger if I told anyone that I had lied at his request at the trial.

18. For 18 years, I have kept this secret to myself because I believed Huff then and I continue to believe that he will harm me and my family if I tell the truth. While I remain very fearful of Huff and others in law enforcement who could act at his request, I cannot keep these secrets any longer. I now realize that the lies I told contributed significantly to putting Delma Banks behind bars and on death row. If he in fact belongs there, it should be only as a result of testimony that is truthful. I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19, 1998.

/s/ Charles E. Cook
CHARLES E. COOK

DECLARATION OF ROBERT LEE FARR

County of San Bernardino)

)SS **Declaration of Robert Lee Farr**

State of Califomia)

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

2. I testified at the capital murder trial of Delma Banks, Jr. in Texarkana, Texas in September of 1980.

3. Both before and after Delma was arrested for killing Richard Whitehead, I worked as a police informant for the Bureau of Alcohol, Tobacco, and Firearms; the Texas Department of Public Safety; and the Texarkana, Texas police department. For several years, I supplied information to police officers to help them make cases against drug dealers, a doctor, and pharmacists in Texas and Oklahoma. The ATF agent I worked for was in Oklahoma. The Texas DPS officer I worked with was Dale Hampton in Texas. Sometimes the police agencies paid me money for my work. The police also would let me falsify prescriptions for drugs that I was addicted to without arresting me because of my work for them. Several of the police officers knew that I sold pills.

4. I did not know Richard Whitehead. The only thing I knew about his murder is what I saw in the news. It was a very high profile case and was reported on the TV and in the newspapers constantly.

5. About one week before Delma's arrest, Willie Huff, a police officer with the Bowie County Sheriffs Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office

and asked me to get into his car. While I sat in his car, Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

6. I assume Willie Huff came to me because I was married to Sharon Jefferson, Delma's girlfriend's sister, and so I knew the same people Delma knew. Like a lot of other policemen in the Texarkana area, Willie knew that I used and sold pills with false prescriptions. I assumed that if I did not help him with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help Willie. I was afraid that if I didn't help him, I would be arrested.

7. Willie first asked me if I knew Delma and I said yes. Willie Huff asked me to help him find Delma's gun. I told Willie that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.

8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.

9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma's gun was in Dallas. I also told Willie that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow up. This was the third or forth conversation I had with Willie.

10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove away from the house, our car was pulled over by the police on the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.

11. While I was at the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

12. At some point before Delma's trial, the District Attorney's office asked me to come by to look at two guns that they had. Both the District Attorney Louis Raffaelli and Charlie were there. They asked me if I recognized either of the guns, and I told them that I did not.

13. Less than a year after my testimony at Delma's trial, I left Texarkana, Texas. During my years as a police informant, I had helped the police put a lot of people

away on drug charges. I had been paid for my work. I left because the people I had helped the police put away found out that I was a police informant. I was afraid of them. Also, Dale Hampton told me that I should stop working for the police because my life might be in danger. Because of all this, I am afraid to return to Texarkana, Texas because I fear for my life.

I have read the above paragraphs, numbered one through thirteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on November 4, 1996.

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:

/s/ Tena B. Francis
TENA B. FRANCIS

County of Dallas
State of Texas

DECLARATION OF CAROL N. COOK

1. My name is Carol Nadine Cook. I reside in Dallas, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. My brother is Charles Cook. In 1980, he testified in the capital murder trial of *State of Texas v. Delma Banks, Jr.*, in Bowie County, Texas. I also testified briefly in the trial.

3. I met Delma Banks on Saturday, April 12, 1980. I was at my home in Dallas caring for my third son who was born the week earlier, on April 6. Charles drove to the house with a man he introduced as Delma Banks. I had not met him previously. The car they were riding in was a red mustang. I remember the car because Charles did not own a car at that time.

4. Charles and Delma stayed for about 45 minutes. Delma struck me as polite. Thus, I was surprised to learn of Delma Banks' arrest for murder in Dallas the next week.

5. Shortly after Delma's arrest, I had my brother Charles arrested for arson. He threw a small gasoline bomb at my kitchen when my kids were in the house. The fire company had to come and put the fire out. When I learned afterwards that Charles had taken this drastic action to help me—I was then living with a man who—was beating on me—I asked the Dallas authorities to drop this charge. They refused to do so.

6. In August, 1980, Bowie County Deputy Sheriff Willie Huff came to Dallas and me with me and my family. He told us that we were going to have to testify in September at the Delma Banks trial. I did not understand why because I had not witnessed the crime nor know anything about it. My grandparents felt the same way. Nor did we have the money to travel to Texarkana and stay for the trial. Huff also did not

tell us how our testimony would be useful or relevant to the case. Shortly thereafter, he returned with subpoeneas for me, my grandparents, and for Charles' common law wife, Ida (Rita) Marie Martin. He told us we had to testify at the trial. He was unpleasant and rude to us. At this time we learned for the first time that the state would pay our travel expenses, and put us up in a motel. Charles and Ida Marie were present at this meeting with Huff at my grandparents house, and Huff told Charles that he would be staying at the hotel as well.

7. We were driven to Bowie County in September for the trial by Bowie County deputies. When we checked into the hotel, Charles was not allowed to do so. He was taken to the local jail. But during our stay, he was driven back to the hotel by deputies hotel so he would see Ida in her room. The deputies snuck him up the back way so that no one would know he was in the hotel.

8. Prior to my testimony, Huff and the prosecutors told me what they were going to ask me and what answers I was to give. I remember Huff told me to say the car I saw was green, when I recalled it was red. He insisted I say green. On the witness stand, when I was asked this question, I first said red, but then changed my answer to green. I testified the car was green only because Huff had scared me to say it was green. I remain certain today that the car I saw that day was red, not green.

9. Immediately after the trial, Bowie County deputies took me and my family back to Dallas. While Charles had been held in jail for several months prior to the trial on the arson charge that I did not want to pursue, that charge was dismissed as soon as we got back to Dallas.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 1998.

/s/ Carol Nadine Cook
Carol Nadine Cook

State of Texas
County of Bowie

Declaration of Marcus Jefferson

1. My name is Marcus Jefferson. I reside in Texarkana, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. I know Delma Banks. In the late 1970s, he began to date my younger sister Demetra Jefferson. He and Demetra later had four children together.

3. In early April 1980 my older brother Vetrano and Delma got into a fight. During this fight, Delma hit Vetrano across the face with a pistol. Back then, Vetrano was a real hot-head, he liked to drink a lot and to fight. Delma was just the opposite in that he was quiet and rarely drank.

4. A couple of weeks after this incident, Robert Farr, my eldest sister Sharon's husband, said he wanted to speak to Delma and I. Before this I had not really spent much time with him and did not know him real well. On the few occasions I had been with him before he was strung out on drugs. I knew that he dealt drugs at this time, mainly Dilaudin or 'D's, and he was always shooting up. When he shot up he would get real spaced out. On one such occasion, Farr was high on drugs and drove up the back of a stopped car at a drive-thru liquor store. He was so high he got out and blamed the other driver.

5. Farr said he had an idea about how he and us could make some money. He said he knew a liquor store that he could rob, and said "all I need is a gun". Delma said that his gun was in Dallas and Farr urged Delma that we all drive to Dallas to get it. I had never been to Dallas and was excited about going on a road-trip. I did not really think about what would happen once we had got the gun. Farr never said

which liquor store it was and I thought it was too late to rob anything that night.

6. Delma and I agreed to go to Dallas late that evening, and we all got into Farr's car. Before we left Texarkana, Farr said he needed to do something and so we stopped on College Hill, I believe at a 7-11, and he made a telephone call. He also shot up some drugs.

7. We then set off for Dallas. Delma drove as Farr was too spaced out. We stopped once more at Hook's truck stop on Interstate 30 and filled up with gas. Farr went into the station, paid for the gas, and bought some snacks.

8. There was almost no conversation during the drive to Dallas. Delma was concentrating on driving, Farr was too high to talk and I dozed some.

9. After arriving in Dallas, we drove to a house and Delma got out and went to the door. I am not sure how long he was up there but it was a while. Farr was still high at this time. When Delma got back to the car he said "this man ain't got my gun; some one else has my gun, and he gave me another one." This was the only thing Delma said about a gun. He made no references at all to committing robbery. Also, Delma never said that he would take care of any trouble at any robbery nor did he ask if the gun he had been given would be adequate for the job.

10. We got lost on the way back and got on the Interstate going west, not east toward Texarkana. We turned around (legally), and as soon as we were heading in the right direction, Delma said "the police are behind us." Although surprised, Delma was calm and cooperative, just as if we were going to get a ticket although as far as I could tell we had not broken any traffic laws.

11. Delma pulled the car over and got out. Farr did not exit because he was still high, and I was trapped in the back seat.

The police began to holler at us to get out and pointed shotguns through the back window. I yelled at Farr to get out as I was terrified the police would shoot me. I got out immediately after Farr got out.

12. There were an awful lot of police cars about. I was cuffed and put in one car and Delma and Farr were put in another. I was taken to a police station and kept in an interrogation room in cuffs. No-one asked me any questions other than one officer who was watching me who offered me a smoke. He asked me some questions about fishing and where I like to fish. I told him Wright Patman lake and the Millwood dam.

13. About seven or eight in the morning the police let me go and Farr and I drove back to Texarkana in Farr's car.

14. The idea to go to Dallas in the first place, to obtain a gun, and to commit a robbery, were Farr's ideas alone. I never thought about robbing anyplace or anyone, and I never heard Delma say he wanted to rob anyone or anyplace. We foolishly decided to go that night to help out our brother-in-law (Farr).

15. I have not spoken with any representative of Delma Banks until 1998. [I have not spoken to Delma since his arrest in 1980.] I did not want to get into this because I was afraid that I could be put in jail. I have decided to give this statement now because it is the truth and because I don't think the jury heard all the truth at Delma's trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27, 1998.

/s/ Marcus Jefferson
Marcus Jefferson

State of Texas
County of Bowie

Declaration of Vetrano Jefferson

1. My name is Vetrano Jefferson. I am a resident of Texarkana, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. I know Delma Banks. I came to know him during the late 1970s when he began to date my younger sister, Demetra Jefferson. He and Demetra later had four children together.

3. I was not a close friend of Delma. Prior to his incarceration in 1980, he and I did not spend much time together. Indeed, I have not spoken to him since he was arrested for the Whitehead murder in 1980. Nevertheless; I would say that we had a good relationship other than the one incident that I testified about at his trial and which I describe in more detail below.

4. In early April, 1980, I was at Demetra's house one day; Delma and my older sister Sharon Jefferson were also present. I had been drinking wine throughout the day, and at some point, Delma and I began to argue. This dispute began as a result of some disrespectful comments I directed toward Demetra, who at that time, was pregnant. Delma did not like the comments and asked me to stop. I did not and instead, as I was drunk, grew angry. We began to fight. During the fight, because I was beating him, Delma hit me on the side of my face with a gun. The gun that Delma hit me with was a little thing, I think a .22. It had a chrome finish and a white pearl type handle. I had seen Delma carry this pistol on prior occasions. This blow opened a gash on my cheek. I went to the bathroom, and cleaned the wound.

5. I left the house, and Delma and others soon came out as well. When I reached the car, I opened the trunk to get a screwdriver. I did this because I could start my car only with this tool as the key would not turn. When Delma saw me

reach into the truck, he threatened me. I believe he did so because he could see I was angry and thought I was reaching for a weapon. My sister Sharon finally split us apart and I then drove to my parents' house. I was so angry at Delma when I arrived there that I grabbed my father's shotgun. Luckily, my parents disarmed me before I would leave the house.

6. That evening, my parents and I went to the Sheriff's office and swore out a warrant on Delma.

7. No police officer or anyone from the DA's office ever came to speak to me about this incident. After a short while, I decided to forget about it and let things lie.

8. About two or three days before I testified in Delma's trial, I was asleep in bed when I heard someone banging on my door and calling my name. I was still pretty much asleep and did not think anything of it until 2 police officers, one of whom was Deputy Sheriff Willie Huff, entered my room and shook me awake. Huff gave me a subpoena and said I had to come testify against Delma. Because I believed he was talking about when Delma had hit me and I had decided to let that lie, I said I would not go. Huff then arrested me, took me to the police station, and put me in a cell.

9. After a while Huff came and got me, took me into his office, showed me rusty looking, black, automatic .25 pistol, and asked if this was the gun Delma had used to hit me. When I told him it was not he put me back into my cell. Huff had me brought to his office on a couple of other occasions and asked me the same thing. I always told him the gun he was showing me was not the gun that Delma hit me with. He wanted me to say this was Delma's gun, and got very angry when I refused to do so. I believe this is the main reason I was kept in jail before my testimony.

10. I didn't really know much about Delma's murder case because, at that time, I was drinking heavily, and keeping to myself. In fact, I knew nothing about the Whitehead murder. I

remember I was surprised to learn that Delma had been charged with it as other than when we fought I had never heard of him getting into any fights or any sort of trouble. He was not much of a drinker and rarely drank at all.

11. I don't recall anybody else coming to talk to me about Delma's case prior to his trial. In particular, Delma's attorney and investigator, Lynn Cooksey and Dennis Walters, never came to talk to me about anything. At that time, I would have been willing to talk to them about what I knew about Delma, and to let them know that the fight we had was my fault, not Delma's.

12. I was in jail about 2 or 3 days before testifying in Delma's trial. After I finished they let me go.

13. During the spring of 1980, I was hanging out with Robert Farr quite a bit. He was Sharon's husband and they were living on Baltimore Street which was about 10 blocks from where I lived.

14. I knew that he was dealing drugs. I was with him on several occasions when he sold pills. People would either come to his house or he would go to them.

15. Farr got his pills by filling out false prescriptions and by getting doctors to prescribe him pills as he had a bullet lodged in his head. On a couple of occasions Farr used me to go and get prescriptions for him.

16. During the past several years, representatives of Delma Banks have attempted to speak with me about these events. I have not agreed to speak with them until recently because I did not want to get into this again. I have agreed now to speak because I believe the court should have all the facts about the case that I know.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Vetrano Jefferson
Vetrano Jefferson
11-20-98

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

ORDER ESTABLISHING ISSUES FOR EVIDENTIARY HEARING

COMES on to be heard the parties' Responses to the Court's Order of January 21, 1998, (Docket #70), requesting that the parties identify issues for presentation at the evidentiary hearing scheduled for June 7 and 8, 1999. The Court having considered the Responses of the parties, to said Order, along with the other pleadings and the record filed in this case finds as follows:

Petitioner contends that he should be allowed to present evidence on three distinct issues, namely (1) whether Petitioner's Fourteenth Amendment rights were violated by the state witholding "crucial exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr," *Brady v. Maryland*, 373 U.S. 83 (1963), (2) whether Petitioner recieved ineffective assistance of counsel at trial and on appeal on various issues, and (3) whether Petitioner's Fourteenth Amendment rights were violated by the state's longtime practice of peremptorily removing African-American jurors from felony cases. *Swain v. Alabama*, 380 U.S. 202 (1965). The Respondent stands by

his assertion that Petitioner is barred from further factual development of his claims, because he has had an adequate opportunity to develop the factual background in state court.[1] The Respondent states that Petitioner has failed to show that he was prevented from pursuing factual development of these claims in the state habeas proceedings. The Court will address the three submitted issues in the order presented.

Discussion

A habeas petitioner, challenging a state conviction, cannot pursue further factual development of a claim in federal court unless he was denied a "full and fair hearing in state court" on the issue at hand. *Green v. Johnson*, 160 F.3d 1029, 1047 (5th Cir. 1998). No hearing is required where the record is complete and the Petitioner raises only legal claims. *Id.*

1. *Brady Claim:* Petitioner asserts that the state violated his Fourteenth Amendment rights by witholding exculpatory and impeachment evidence concerning at least two important witnesses—Charles Cook and Robert Farr. In support of his request for evidentiary hearing, Petitioner presents the Court with the affidavits of Mr. Cook and Mr. Farr. A review of the trial record in this case reveals that the testimony of Cook and Farr was critical to the state's case in chief at the guilt stage of his trial. The affidavits of Cook and Farr indicate that they have only very recently been willing to discuss this case with Petitioner or his attorneys. Petitioner asserts and offers proof that he could not have had the information regarding this issue prior to any of his three state evidentiary hearings. Petitioner sought the aid of the state court to develop these facts in October 1992, when he asked the state court for

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[1] The Court notes that Petitioner enjoyed three state evidentiary hearings over a thirteen year period. *Ex parte Banks*, Application No. 13,569 (evidentiary hearing held January 2, 1984); *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989)(evidenitary hearing held May 15, 1984); and *Ex parte Banks*, Application No. 13,569 (evidentiary hearing held March 29-April 1, 1993 and July 22, 1993).

investigative assistance regarding Cook's testimony. The Respondent objected to this request and stated that the state had made no deals with Cook for his testimony. The state court never acted on Petitioner's request for assistance. Consequently, no evidence was presented on this claim at the third state evidentiary hearing. The state court in its findings of fact and conclusions of law stated that "there was no agreement between the State and the witness Charles Cook." *Ex parte Banks*, Application No. 13,568-03 (third state application), Transcript Vol. V, 167-168. The state court makes no other mention of this issue, and no specific finding that the state did not suppress exculpatory evidence.

A federal habeas court is bound by a state habeas court's finding of fact that there had been no suppression of exculpatory evidence. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). In *Little* the district court had before it a specific factual finding, by the state court, that there was no suppression of exculpatory evidence. *Id.* The same is not true in this instance. Here the state habeas court made no specific findings of fact on this issue. Further, Petitioner has demonstrated that he did not have a full and fair opportunity to present his evidence on this issue to the state court, primarily because the witnesses did not come forward until after the state court evidentiary hearings. Petitioner should be granted leave to develop the factual basis for his *Brady* claim.

2. *Ineffective Assistance of Counsel*: Petitioner asserts that he should be allowed an opportunity to further develop the record underlying his claim of ineffective assistance of counsel. Petitioner's ineffective counsel claims encompass some eleven (11) trial errors. Petitioner also claims one (1) error by appellate counsel that rendered his assistance to Petitioner ineffective.

In this case the state habeas court made no specific findings of fact regarding Petitioner's claims of ineffective assistance of counsel. The state court held that "counsel for Applicant at

trial did give the Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." *Ex parte Banks*, Application No. 13,568-03 (third state application), Transcript Vol. V, 169. The state court also concluded that "as a matter of law [Petitioner] received effective assistance of counsel at all stages" of the trial. *Id.* at 173.

"There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. As such, when the state court did not resolve a fact issue that would entitle the petitioner to relief if resolved in his favor, the petitioner is entitled to an evidentiary hearing on the issue." *Goodwin*, 132 F.3d at 183. In determining whether the state court reached the merits of a factual issue, the district court may, in appropriate circumstances, imply fact-findings from the state court's disposition of a federal claim that turns on the factual issue. *Id.* (citations omitted). In *Townsend v. Sain*, 372 U.S. 293, 314 (1963), the Supreme Court observed: "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia."

Petitioner raises some twelve instances of lack of effective assistance of counsel. In this case, neither the state district court nor the Texas Court of Criminal Appeals made any express findings of fact regarding whether Petitioner received effective assistance of counsel at trial and on direct appeal. Furthermore, it is not clear that either court made any implicit fact-findings on these issues. In addressing Petitioner's habeas petition, the state courts made no finding of fact or conclusion of law regarding any of Petitioner's specific allegations of ineffective counsel. Rather, the state district court recommended, in a two-paragraph passage containing

no legal analysis of the claims, that Petitioner's request for relief be denied. The Texas Court of Criminal Appeals accepted the recommendation in an even more summary fashion. A conclusion that the state courts' summary denial of the instant petition for habeas corpus relief implies a finding that Petitioner received effective assistance of counsel finds no support in the Supreme Court's jurisprudence and is contrary to this circuit's treatment of implied fact-findings. Petitioner should be allowed to develop the record on his ineffective assistance of counsel claims.

3. *Swain claim*: Lastly Petitioner asserts that he should be allowed to present evidence of the systematic exclusion of African-Americans from jury service on felony trials in Bowie County, Texas. Petitioner raised this claim in state court and requested expert assistance from the state court to allow proper development of the claim. The state court denied Petitioner's request for expert and investigative assistance, but did allow him to put on testimony of various witnesses, including a statistical expert. Petitioner claims that the state court denied him a full and fair opportunity to present evidence by denying his requests for assistance. Petitioner seeks to submit affidavits from Dr. Kent Tedin, the statistician who testified at the third state habeas hearing, and from a paralegal who gathered statistics regarding the races of specific veniremen excluded from Bowie County, Texas juries during the relevant time frame.

Rule 7(b) of the Rules Governing Section 2254 Cases allows the Court to order the parties to expand the record including the filing of affidavits. In this case the Court notes that the state habeas court did make a finding that "the statistical data, standing alone, presents a pattern, of exclusion of black veniremen." The state habeas court also found that certain facts eroded the reliability of the statistical data, including lack of certain types of information about prospective veniremen. Petitioner, avers that he now

possesses the missing statistical information, and that he was prevented from presenting this evidence in the state proceeding by the actions of the trial court.

The Court finds that expansion of the record in regards to the *Swain* claim is appropriate in this instance.

IT IS THEREFORE ORDERED that the Petitioner be allowed to proceed with presentation of additional evidence regarding the following issues:

1. Whether Petitioner's Fourteenth Amendment rights were violated by the state witholding exculpatory tending to show Petitioner's innocence.

2. Whether Petitioner's Fourteenth Amendment rights were violated by the state witholding impeachment evidence concerning two of the state's essential witnesses, Charles Cook and Robert Farr.

3. Whether Petitioner was afforded effective assistance of counsel in the following particulars:

a. Whether trial counsel conducted an adequate pretrial investigation, for either the guilt phase or the punishment phase of the trial.

b. Whether trial counsel effectively cross-examined the state's witnesses.

c. Whether trial counsel was ineffective in failing to call all the mitigation witnesses who were prepared to testify on behalf of Petitioner.

d. Whether trial counsel was ineffective for failing to have Petitioner examined by a mental health expert and for failing to seek such expert assistance.

IT IS FURTHER ORDERED that Petitioner's presentation of evidence, at the Evidentiary Hearing scheduled for June 7 and 8, 1999, be limited to the foregoing issues.

IT IS FURTHER ORDERED, that Petitioner expand the record in this matter pursuant to Rule 7 of the Rules Governing Section 2254 Cases, by filing with the Court the affidavits of Dr. Kent Tedin and Ms. Helen Beardsley, regarding the *Swain* claim urged by Petitioner. This expansion of the record shall occur in accord with the Court's Scheduling Order. Pursuant to Rule 7(c), Petitioner will submit copies of the affidavits to the Respondent at the time he files same with the Court. Respondent shall have the right thereafter to admit or deny the correctness of the affidavits as provided by Rule 7(c) and the Court's Scheduling Order.

SIGNED this 4th day of March, 1999.

/s/ Caroline Malone
CAROLINE MALONE
UNITED STATES
MAGISTRATE JUDGE

Federal Evidentiary Hearing (Excerpt)

* * * *

Q Can we turn now to the litigation investigation in this case. And let me ask you first of all, what accounts for why some people grow up and seem to lead productive lives and others don't?

A That's a, I think, fundamental question as we look at individuals who suffer abuse and trauma in their childhood and then do not go on to commit acts of significant violence. The best analogy I think is not unlike children growing up on top of a toxic waste dump. All the children don't get cancer who grow up on top of the toxic waste dump, but you have disproportion incidents of cancer among those kids. Maybe it's 1 in 10 of those children, but in the surrounding community it's 1 in 500. So you simply have a dramatically increase morbidity from that group. And a similar thing happens in response to toxic childhood experiences, as best we can understand it as we look at differences and outcome, it's a function of trauma. And Mr. Banks had significant trauma that he was exposed to. Pre-exposing and contextual factors. For example, the degree of violence and conflict that's happening in his home and also the skin disease that he had. That then interfered with one of the primary protective factors that might have otherwise occurred, because he had this skin disease and the asthma, he then was not in close association with peers or athletics or other activities that would have given him some substitute mentoring and protection. And also as a function to intellectual problems and learning disabilities, school was also not a sanctuary for him.

Q It's important to explore when you are preparing for a capital case life history of an individual?

A Yes, it is. That's fundamentally important.

Q Why is that?

A Well, the family history and the life history of this individual is kind of a road map. As we look at that from the generational point of view, we see influences that track from

generation to generation to generation. And that gives us some sense of the family script and history within this family system. Though there's a function of the effects of heredity as well as behavioral shaping of a child. And these account for a general maxim that childhood is formative. A child is a father of a man. That's why we are so concerned about our children not having traumatic and major adverse life experiences, because we all know that's when the concrete and the shape of it is being formed. Later in life the traumas put dents in it, but they don't affect the basic structure the way the childhood does.

Q Are there some core principles here?

A Yes, there are. There is a fundamental principle that has been recognized in psychology for decades and that's that the quality of attachment to parents and other members of your family during childhood is central to how the child ends up relating to and valuing other members in society as an adult. That's bedrock. The various schools of thought in psychology don't argue with this basic notion.

Q What about early childhood development?

A Well, we can use an analogy of a house being constructed to think about how you go about creating a healthy human being. This is not—this notion of life being like a house being constructed is not original to me. Jesus used a similar analogy in his parables and other folks have since that time. We could think of early childhood as being like laying the foundation of a house and that's based on secure stable relationships with parents.

Q Once the child is older?

A In middle childhood, it's like the framework of a house is going up. And here the fundamental experience is that there is continued security and stability and supportive parental involvement and expanding competencies, which is a fancy way of saying you're getting the kid out there in music lessons and little league and gymnastics. You're helping them be more independent and successful and separate creatures

here in the world and you're clapping for them. You're out supporting that.

Q Later on?

A In adolescence you need positive same sex role models. And the parents are gradually turning loose and letting the child have more freedom. And then the kid screws up and you clamp back down, and then you start to relax again. The parents are kind of titrating how much support and structure the child requires. And then in late adolescence and early adulthood what's required is having intact capabilities and available opportunities and then having adults that are there to help mentor and assist and guide you and kind of get you launched into adulthood yourself. And this sequence of events is how you get the most functional, the most healthy human beings. It's how you construct the strongest house.

Q In your evaluation in this case, Doctor, did you identify any factors that can harm or inhibit healthy development?

A Yes, I did.

Q What did you find?

A I identified a number of emotional damaging factors in the history of Delma Banks. First, there is multi-generational family distress. The alcoholism of his father, the physical and emotional abuse by his father, observed domestic violence, his mother's dependent victimization and her failure to protect him and the other children, his learning disability and associated school failure, a chronic skin rash and bronchial asthma, and isolation from his peers.

Q What did you find with regard to family distress? Are they generational?

A His father's father, his paternal grandfather, was an alcoholic, he was violent and abusive to his own wife and kids, he chased his wife up a tree where she remained for hours. And this happened on more than one occasion that he would be violently intoxicated. And then Delma's father was

alcoholic, violent and abusive to his wife and kids, also chased his wife out of the house.

Q What are the effects of this alcoholism?

A The adverse effects of parental alcoholism on a child are many and broad. First, there is a genetic increased susceptibility to substance abuse. There is modeling of inappropriate and irresponsible use of alcohol. The psychological injuries that the child sustains involve damage attachment or bonding to the parents. The likelihood of there being neglect by one or both parents that is associated with the intoxication dramatically increase risk of physical and emotional abuse. A home setting and environment that is inconsistent and unpredictable. Exactly the opposite of what a child requires. Children are very egocentric. That means that if the world around them is out of control, they don't think there's something wrong with the adults around them, they think they're incompetent. Or if they're not loved very well, the child doesn't think there's something wrong with daddy, the child says there's something wrong with me, I'm unlovable. So they internalize and apply it in a very egocentric way. Their demands for premature responsibility for the child to act more like an adult in the family, essentially, it results in a loss in childhood and the normal development sequences that we would expect to see there. It's a broad social and psychological risk factor for relationship problems, self-control, and behavior disorders, feelings of defectiveness, psychological disorders, and criminal behavior. It's a very broad base in risk factors.

Q What about domestic violence?

A Mr. Banks observed his father yelling and cussing at Ellean, his mother, and other children in the family. His father making jealous accusations of Ellean. Just Delma Banks, Sr., would demand that Ellane cook for him when he would come in in the early morning hours and be drunk and then throw the food on the floor. He repeatedly threatened to

harm her and the children. He discharged fire arms in the house. It was described to me that there were more bullet holes in the house than windows and doors. He slapped and backhanded Ellean. She would flee with the kids if she could and take refuge with neighbors or family or hide under a bridge. At other times, she simply fled and was not able to take the kids with her and they would then be left with Mr. Banks, Sr., who would be in a drunken rage.

Q What's the effect of this on children growing up in a home?

A The effects of observed domestic violence are quite destructive. There are models of aggression that are displayed to the child who is experiencing a pretty pervasive climate of confusion and terror that results in pervasive insecurity and anxiety. The child feels feelings of guilt that he's not able to fix this as well as feelings of helplessness. There is profoundly damaged attachment to the abuser. Ambivalence toward mama, toward the victim for not doing something, for not removing herself, or better protecting the children, and yet feeling sorry for her and wanting to protect her. A significant amount of anger that you come out of this. In summary, observing chronic domestic violence is considered to be as psychologically damaging on the child as being directly physically abused themself.

Q Did you find evidence of physical abuse?

A Yes, I did.

Q What did you find?

A It was a climate of physical abuse and emotional terrorization that was directed toward Delma Banks by his father. His father yelled and cussed at him. When he was a little baby, threatening to knock his teeth out with a frying pan when he was fussy when he was teething. He held Delma Banks and his siblings at gun point. Threatened to sic the dogs on the kids. There's an instance where the children took refuge on top of the couch, because the dogs were very aggressively coming after them. And they stayed awake

through the night up on top of the couch. Delma Banks, Jr., was beaten with a belt, strap, horse whip, extension cord, coat hanger. After one of these beatings, he was tied to a tree by his father and then left with statements of how the wild animals were going to find him and begin to chew on him during the night.

Q How does this affect children?

A As you would anticipate, the impact of this is broad and horrific. There is damaged attachment in many ways, the recurrent confusion the child experiences, constant terror and fearfulness, damaged capacity and skills to relate to others, because the family remember is the place where these primary skills develop, where you learn what it means to care about others and relate to them. There's a development of an identity of being incompetent and unlovable. Broad risk per se. Wide variety of psychological disorders, much increased risk of neurophysiological problems and intellectual deficits, marked increase risk for behavior problems in childhood, as well as violent and criminal behavior in adolescence and adults. And again a wide literature was available across the 1970's regarding this.

Q Have you made any findings with regard to Mrs. Banks or the effect of Mrs. Banks on this?

A Yes, I did.

Q What was that?

A Mrs. Banks remained in a relationship where she and the children were violently victimized. Repeatedly she would leave and separate only to reconcile and come back into the marriage. She tried to keep the children quite and in their rooms and restrict their activities and keep friends from coming over to avoid setting off Delma Banks, Sr. And on many occasions she fled the house leaving the children behind with Delma Banks, Sr., who was drunk and raging. So out of her own fears of independence and perhaps practical economic factors as well, she remained victimized herself and failed to protect the kids.

Q Did you find evidence of—with regards to Mr. Banks, Jr., regarding learning disability?

A Yes, I did.

Q What did you find?

A There are indications of his having difficulty learning in school. His reading capability remained low until his prison confinement and still somewhat marginal. His school performance was poor. He was held back a year in elementary school and subsequently is described as being socially promoted. His verbal IQ score is of a borderline intellectual capability straddling the edge of mental retardation to borderline to below average. There is a significant discrepancy between his verbal and performance IQ scores. And there are deficits that are displayed in the neuropsych assessments and communication, task shift and planning, process and knowledge situations, and short term memory.

Q Did you find any deficits in verbal?

A Yes, I did. And this depicts the various testings that have been done on his verbal IQ score. These occurred between 1992 and 1996. And they cluster, if we look at this as a—the distribution of intelligence or IQ scores in the community where the middle IQ score is 100, that means 50 percent of the population have a IQ score of greater than 100 and 50 percent have an IQ score of less. We look at the various scores that he's obtained across this—these repeated examinations. An IQ—verbal IQ score of 75 which corresponds with the 5th percentile, verbal IQ score of 80 that corresponds to the 9th percentile, and a verbal IQ score of 82 that corresponds with the 12th percentile. Now IQ scores are not an exact measurement. It's kind of like getting on a scale. You step on it one time it says your weight is 150 and you get off of it, you step right back on it says 147, you get right back off of it you get it says 153. There's a certain error range called a standard error of measurement and so we can say with a 95 percent degree of certainty that if we attach plus or

minus five points to each of these—. So this range across here, is where his IQ score—verbal IQ score abilities are likely to fall and his straddles the mental retardation range comes right at the edge of it. This is the mental retardation range below 70 this mark with the yellow bar. It straddles the mental retardation range, the borderline range, and the below average range.

Q Well, how does a learning disability impact on school success or failure?

A Well, certainly, to have a learning disability almost by definition results in school your school experience being one of failure and low achievement. With—it can be mediated some by special education and intervention. But it's broader than simply failing in school. As the child goes to school, he is aware that his performance is deficient and school's a place of frustration and disappointment. Now this is particularly critical for a child that has multiple other risk factors, whose home is chaotic and violent, and whose body is out of control with a skin disorder. If you can go to school and be successful, there then there is a island in your life that provides some sanctuary. But if you're learning disabled or have intellectual problems, then that's not there for you either. The child is aware of being different, has reduced self esteem. There's little sense of safety or refuge at school. Since the system really doesn't have a place for you, this kind of natural order of society that's experienced of childhood, marked risk of dropping out of school, increased susceptibility of influence in terms of being an adolescent who's out of school, reduced employment capability and opportunity. And again this is a broad social risk factor for all kinds of adverse outcomes. We can see an illustration of that if we look at the educational levels of individuals who are in prison. This was a large scale prison survey that was performed in 1974, published in 1979. And what we see is is that at that time 32 percent of state prison inmates had an education of 8th grade or less. The highest grade they obtained was 8th. That over 70

percent had a less than a high school graduation. And this is a very practical demonstration of the impacts of learning disabilities and school failure as reflected in educational levels of folks ending up in prison.

Q Did you find any evidence of Mr. Banks having skin problems or other problems?

A Yes, I did.

Q What did you find?

A Both the medical records that I reviewed prior to 1980, as well as his TDC records after 1980, give evidence of a chronic skin disease. He broke out in a rash covering his body within weeks after birth. As an infant his mom tied socks to his hands and then tied his hands together to keep him from scratching himself. And still he would rub his face raw on a pillow. He was doctored with home remedies because they couldn't afford medical attention on many occasions. This is not a subtle rash. We're talking about weeping, oozing, bleeding lesions and sores and cracks in the skins. Even in TDC, there is some description about there being these weeping skin abrasions and sores. The condition worsened so they sought medical attention. He was given penicillin and then nearly died of an allergic reaction and it also much aggravated this dermatitis condition. He was discovered to be allergic to beans, eggs, fish, and poultry. His dad was working in a poultry plant, so his dad simply coming in the house would set off a reaction. As well as the problem that a family that's already economically and psychologically stressed has to prepare a special diet for a child. His skin hurt much of the time. His activities—physical activities were restricted, because movement would open the scabs that tend to occur at the folds of his elbows and knees. He was extremely self-conscious and so wore long sleeve shirts and pants. He was ridiculed by peers who responded to these open, oozing sores with teasing and disgust. He was subject to severe asthma attacks. And then faced multiple adverse outcomes that are a part of these including chronic pain, a

sense of being different and defective, withdrawing from normal activities, eroded opportunities for competence and independence, because he's not out there with his peers or involved in the athletic activities. So then he ends up being isolated and rejected by them.

Q Now what are the further consequences of these kinds of health problems?

A Well, if you look at the literature that was available in 1978 regarding the impact of a chronic health condition on child development, you see eight basic emotional needs that children have that are impeded or blocked by chronic health conditions. And those include love and affection, security, acceptance as an individual, self respect, achievement, recognition, independence, and authority and discipline. Instead of these needs being met, here are the experiences of a child with chronic illness. And again many of these are reflective of Delma Banks' experience in childhood. Feelings of weakness, as his body was failing him and he couldn't do what other kids would do. Feelings of being different, fear of the unknown in terms of when an asthma attack was going to occur again or when his skin was going to erupt further. Fear of the pain of tearing open the scabs as well as exacerbating the condition. Blocked achievement. Dependence because he is not able to be out there in—out there with the other kids where you develop and experience independent competence. Altered discipline of two sorts. First, they may be—your family may be easier on you out of sympathy and give you some special waivers of expectations. At the same time, when you're in an abusive family the way Delma Banks was; you may be targeted more because you're a source of additional frustration in the family. Feelings of rejection both within the home as well as among his peers. Lack of acceptance, hostility, lack of affection, restricted activities, relationship restrictions, and also what you picture for your future. Are you going to have a girlfriend, are you going to have a wife, are you going to have a family, and what's your future health

experience hold for you?

Q What's the impact of fear, isolation, and rejection?

A Well just—if we look at just one of those factors which is that the derma—this chronic skin condition isolated him from his peers, peer isolation and rejection is its own very significant broad social risk factor for adverse outcomes. And all kinds of things that are associated with it. Not only the emotional experience of loneliness and feelings of defectiveness, but because you're not participating with the other kids and are not in their households and don't have the mentoring of coaches and indian guides and scout leaders and that sort of thing. All kinds of opportunities for the development of competence and social skills and having substitute adult mentors to replace your own family or parents who may be deficient, you're deprived of alterative models about how you go about relating to others in a healthy fashion. So this single outcome of the chronic skin condition is a very significant one that fundamentally alters—that can fundamentally alter the course of development.

Q Given all these findings, how did these factors affect Mr. Banks' development?

A Well, if we go back to our analogy of a house under construction, the foundation is disturbed at the outset from his chronic skin condition, his father's drunken rages, the chaotic nature of the household, the marital separations, the stability and security and safety of attachment that allows you to make a strong foundation where lacking. In middle childhood, the chronic skin disease continues and he's learning disabled and a school failure and is subjected to peer ridicule and rejection and isolation. Continuing in middle childhood there is his father's alcoholism, the physical and emotional abuse that he's subjected to in observing domestic violence in the home. The framework here is having a hard time getting constructed. It's being knocked down even as it's being built. In adolescence, continuing chronic skin disease and a violent and chaotic household with peer rejection, isolation, and

failure in school. And continuing in late adolescence, continued chronic skin disease, continued violence in the home, continued peer isolation and rejection, continued school failure, and dropping out of school. And as we look at Delma Banks at the time of these events, developmentally he is still in a late adolescent phase at that time.

Q Given all of this and your human studies, what would your opinion be of how Mr. Banks, if he had been sentenced to life, adjusted in the Texas prison system?

A The prison system provides a significant degree of external structure to help insulate and support the damages that have occurred to somebody up to that time. In fact, a history of having—of having much damage having been done—to somebody emotionally across the childhood, the presence of learning disability and school failure, many of these risk factors are quite commonly observed in a prison population. And are particularly commonly observed in capital offenders. So those factors don't alter the base rates. We've already accounted for those. Because in our base rates following first degree murderers and prison inmates and long term inmates, those individuals often have histories that are similar to his and so what happens then is in the frame work of prison with work and confinement and structure and treatment and staff, it helps block and insulate much of the adverse expressions and damage that might have otherwise been done. And by the time they're paroled many years later in middle adulthood, then their risk in the community as we observed in those other statistics is relatively low.

Q Thank you, Doctor.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

PETITIONER'S POST-HEARING BRIEF

In a post-hearing order, the Court directed briefing on four matters. Three concern the same evidentiary issue: whether *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992), requires the testimony Mr. Banks presented from three former state witnesses be stricken because it was not presented in prior state proceedings. The fourth concerns a legal question: whether the prosecutors' repeated vouching for the credibility of their key witnesses amounts to prosecutorial misconduct. In this submission, Mr. Banks addresses the *Keeney* issue. As he will soon be filing proposed findings of facts and conclusions of law that will address comprehensively the prosecutorial misconduct issues raised by this case, he will address the vouching question in that pleading.

We state our conclusion first. Last year, the Court ordered an evidentiary hearing on two issues: (1) due process claims flowing from the state's suppression of exculpatory and impeaching evidence concerning its two key witnesses,

Charles Cook and Robert Farr, and (2) trial counsel's ineffectiveness. The court also announced that it would allow limited supplemental evidence on the jury discrimination claim. It did so only after reviewing the entire record, Mr. Banks' assertions, advanced in several pleading, that further factual development of these issues was warranted, and the Director's opposition which relied, *inter alia*, on the *Keeney* rule. Because there was no actual hearing on the due process and ineffectiveness issues and both received only summary treatment in state proceedings, the Court properly concluded that *Townsend v. Sain*, 373 U.S. 293 (1963), as modified in part by *Keeney*, allowed for further factual development on these issue. This judgment was correct at the time it was made.

Subsequent events only confirm the correctness of that judgment. Court ordered discovery dislodged from the prosecutors' files a lengthy pretrial statement law enforcement officials extracted from Mr. Cook that had not been previously disclosed to Mr. Banks. It contains a wealth of impeaching information and supports Mr. Cook's hearing testimony that his key trial testimony was coached and inaccurate. This important document was suppressed at trial and throughout later state court proceedings. Moreover, despite Robert Farr's flat denial at trial that he was an informant, which trial prosecutors assured jurors was truthful, the record now establishes beyond doubt that he served as a paid informant in this case, that much of his testimony was misleading and untruthful, and that he was unavailable and unwilling to reveal this important information to Mr. Banks until after all state court proceedings. Moreover, despite Robert Farr's flat denial at trial that he was an informant, which trial prosecutors assured jurors was truthful, the record now establishes beyond doubt that he served as a paid informant in this case, that much of his testimony was misleading and untruthful, and that he was unavailable and

unwilling to reveal this important information to Mr. Banks until after all state proceedings had concluded.

Thus, it is not a close question as to whether the Court was correct in ordering the evidentiary hearing in the first place. A hearing was plainly warranted. And given what the record now shows, Mr. Banks cannot imagine any construction of *Keeney* that would require the Court to strike the testimony of any witness who appeared and testified at the June hearing.

1. *Robert Farr's testimony should not be stricken.* A brief review of the history of this due process claim suffices to show that Mr. Farr's testimony was properly received.

James Elliott, one of the trial prosecutors, acknowledged in his testimony before the Court that the Due Process Clause of the Fourteenth Amendment requires the prosecution to disclose exculpatory and impeaching material to the defense prior to trial. FH Tr. 25. If the prosecution utilizes an informant, pays the individual for services rendered, and calls him as a witness, due process requires that this information be disclosed to the defense. Indeed, in this case, the prosecution assured the defense that it understood these obligations, and would voluntarily, without the need for litigation, turn over any such material in advance of trial.[1] Thus, prior to trial, the prosecution understood its straightforward duty to reveal Farr's identity as an informant as well as disclose the fact that he had been paid for his services in this case. Yet even though it had assured the defense it would reveal just this type of information in advance of trial it did not do so.

During trial, Mr. Farr testified at both the guilt and penalty phases of trial. On neither occasion, did Farr volunteer that he was a paid informant. 10 R 2503-08. Indeed, during his penalty phase testimony, he denied that he was an informant.

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[1] In a letter to counsel dated July 7,1980, then assistant district attorney Charles Attaway advised counsel: "we will, without necessity of motions provide you with all discovery to which you are entitled." 1 R 13.

With this affirmative misrepresentation, the prosecutors were obligated to inform the court, defense and jury of Mr. Farr's true status—that indeed he had acted at a paid informant in this case.[2] They remained silent. And to assure any juror who might have a lingering doubt about whether or not Mr. Farr might be an informant, Mr. Rafaelli pointedly charged jurors that Robert Farr "has been open and honest with you in every way." *Id.*, at 2579.

Thus, the record shows that while Mr. Rafaelli and Mr. Elliott knew that Mr. Farr had served as an informant and had been paid for services rendered, they (1) withheld that information from the defense prior to and during trial, (2) allowed Mr. Farr to falsely deny this status before the jury, (3) failed to correct that false testimony, and (4) affirmatively and unambiguously assured the jury that this denial was the complete truth.

It is not surprising then that Mr. Banks and his counsel did not spend time or energy thereafter attempting to demonstrate that Mr. Farr was a paid informant. Suspicions did not arise until January, 1992, when Mr. Banks finally succeeded in locating and speaking to the state's other key witness, Charles Cook, who for the first time revealed that he had testified pursuant to a deal and that some of his testimony was not accurate. Mr. Banks alleged in his state habeas petition, upon information and belief, that Mr. Farr had acted as an informant and that some of his trial testimony was not truthful. *See* Petition for Writ of Habeas Corpus in *Ex Parte Banks* No. 13568, filed January 13, 1992, para. 114, p. 62. He further requested that the court provide funds for an investigator to pursue these and other claims. In its answer, the state never disputed this allegation specifically. While Mr. Elliott, the author of the answer, filed an affidavit summarily denying that Mr. Cook had testified pursuant to a deal, he did

[2] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

not address Mr. Farr's status.[3] Because Mr. Farr could not be located, Mr. Banks was unable to offer any affirmative evidence to support this allegation. In denying the petition, the state court made no finding of fact or legal determination concerning the due process claim that related to Mr. Farr.

It was not until October, 1996—nine month *after* state remedies were exhausted—that Mr. Banks finally located Mr. Farr in southern California. Only then did he reluctantly provide an affidavit in which he disclosed for the first time that he had served as a paid informant in this case, and that much of his testimony was misleading and untrue. In the declaration that Mr. Banks introduced at the June hearing before this Court, FH Tr. 16, Mr. Farr explained that he was afraid of revealing his informant status, that he would not return to Texarkana because of fear to his safety, and that he would not have disclosed his informant status to Mr. Banks prior to October, 1996.[4]

Given this scenario, the Director cannot now assert in good faith that it was Mr. Banks' fault that Mr. Farr's informant status was not litigated before the state court. Mr. Banks' repeated attempts at trial to uncover and present this evidence to the jury was met either by suppression or outright misleading statements. Where the prosecution assures defense counsel that it will voluntarily disclose that which the due process clause requires it to disclose, "defense counsel may reasonably rely" on those representations. *Strickler v. Greene*, 144 L.Ed.2d 286, 303, n.23 (1999). When he sought to litigate this claim in state habeas corpus proceedings, Mr.

[3] It is now clear why Mr. Elliott made no specific reference to Mr. Farr in his answer. A truthful response would have confirmed the merit of Mr. Banks' claim.

[4] The director did not object to the introduction of this declaration or contest the assertions made by Mr. Farr, except to preserve it *Keeney*-based objection to its admission. All the evidence at the hearing that relates to Mr. Farr's declaration account is consistent with its substance.

Elliott generally denied the allegation, (which he had to know was not an accurate response), and the state court held no hearing, made no findings, and did not rule on the claim. And Mr. Farr would not voluntarily disclose this information until after state remedies were exhausted. *See Strickler*, 144 L.Ed.2d at 304, n.27 (evidence is unavailable where state witness is unwilling to speak to defense). Mr. Banks would be hard-pressed to find a circumstance in which he would have a stronger argument that he was entitled to a federal hearing on this claim.

In former pleadings, Mr. Banks has demonstrated that *Townsend v. Sain* obligated this Court to hold a hearing on Mr. Bank's due process claims, given the absence of full and fair review in the state courts. The Court's recent decision in *Strickler v. Greene* confirms this view. The Court would commit plain error if, on this record, it followed the advice of the Director and struck Mr. Farr's testimony.

2. *Ms. Cook and Mr. Jefferson's testimony should not be stricken as well.* Similarly, any argument that Carol Cook or Vetrano Jefferson's hearing testimony must be stricken is wanting as well. Ms. Cook's testimony does not constitute a free-standing due process claim but provides important corroborating evidence concerning Mr. Banks' due process claim that relates to her brother, Charles Cook. Mr. Banks claims that the state violated fundamental due process norms by failing to reveal at trial (1) impeaching information in its possession concerning Mr. Cook, and (2) the fact that Cook's fate on a then pending Dallas arson charge was largely tied to the prosecutors' evaluation of his testimony against Mr. Banks. The state court held no hearing on this claim, and only summarily concluded, on the basis of the summary and incomplete affidavits submitted by Mr. Elliott and Deputy Sheriff Willie Huff, that Mr. Cook had no deal for his testimony.

The Court now possesses a great deal of evidence relevant to this claim that was not before the state court. It shows that despite repeated efforts, Mr. Banks was unable to place Mr. Cook's testimony before the state court due to no fault of his own, and the state court refused to hold an evidentiary hearing at which Mr. Banks could have required Mr. Cook's presence. As with Mr. Farr, Mr. Cook relented and finally agreed to speak to Mr. Banks representatives only long after state proceedings had concluded. Thus, it was not Mr. Banks' fault that Mr. Cooks' testimony, and all of the corroborating evidence now before the Court, was not presented in state proceedings. *Strickler*, 144 L.Ed.2d at 304, n. 23.

Further, we now know that the state suppressed at trial, and withheld from all subsequent state proceedings, a long recorded statement Mr. Cook made to authorities days prior to trial that contains a wealth of impeachment material, as well as corroboration of Mr. Cook's present testimony that his trial testimony was coached, much of it is not true, and that his overriding motivation to testify against Mr. Banks was to secure dismissal of the pending Dallas arson charge and habitual offender papers. *See Respondent's Exhibit #1*, FH Tr. 58. Ms. Cook's testimony corroborates Mr. Cook's present account. She testified that, like her brother, she was urged to give false testimony, *id.*, 125-27, that law enforcement officials told her that her brother would spend a very long time in prison unless he testified against Mr. Banks, *id.*, 123, 126, that those officials plied Mr. Cook with conjugal visits prior to and during his trial testimony, *id.*, 124-25, and that while she had tried prior to Mr. Banks' trial to have the arson charge dismissed, *id.*, 121, she had no success, and took no action to see that that charge was dismissed after Mr. Banks' trial, *id.*, 128.

Because her testimony corroborates Mr. Cook's in several important respects, and because Mr. Banks' due process claim concerning Mr. Cook warranted a hearing just as the

one concerning Mr. Farr, the Director can show no basis to strike her testimony.

Finally, Mr. Vetrano Jefferson's testimony is relevant to the Sixth Amendment ineffective assistance of counsel claim. A hearing in this Court was necessary because no hearing was held in the state court and the state court made no factual findings on evidence that was proffered before it. Where the state court fails to provide a full and fair hearing on a claim, upon demand, a federal court must hold a hearing and the petitioner is free to offer relevant evidence in support thereof. *Townsend v. Sain*. This testimony should not be stricken.

CONCLUSION

For the reasons stated herein, Mr. Banks respectfully requests that the Court not stricken from the record the testimony of Robert Farr, Carol Cook and Vetrano Jefferson.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Mar. 7, 2000]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITIONER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

INTRODUCTION

When the Congress of the United States amended the *habeas corpus* statute in 1867 to allow citizens incarcerated by state process to secure a review of the lawfulness of their imprisonment by the life-tenured federal judiciary, it surely had cases like this in mind.

This capital proceeding presents a rich factual record that demonstrates without question that the adversarial process failed to deliver a fair and just result in this case. It malfunctioned for a number of reasons:

- The trial prosecutors, sworn to uphold the law, repeatedly violated it to bring about Mr. Banks' capital conviction and death sentence. The record conclusively demonstrates repeated violations of core due process protections that significantly affected the verdicts at each stage;

* * * *

As District Attorney Raffaelli would later candidly tell the jurors in his opening statement, "I think the testimony of Charles Cook is critical . . . " 9 R 2129.

Mr. Farr's testimony—that Mr. Banks initiated a subsequent trip to Dallas one week later with Farr and another common-law brother-in-law, Marcus Jefferson, so that Mr. Banks could retrieve his pistol from Mr. Cook and commit armed robberies and, if necessary, kill during those crimes—not only linked Mr. Banks with the murder weapon but was the linchpin of its case for the death penalty as, the state would argue, it demonstrated that Mr. Banks would likely grievously harm or kill again.

The prosecutors had good reason to wonder whether jurors would believe Cook. He was a drug user and twice-convicted felon and made little money from his modest city job. Jurors might find it hard to believe that he would simply abandon a car while selling far less valuable items from it. He was also facing another felony prosecution in Dallas for arson. Habitual offender papers filed in that case one month prior to Mr. Banks' trial meant, upon conviction, that he faced a very long prison sentence. Surely some jurors might seriously wonder whether Cook was testifying honestly, or whether he was shading the truth to please Bowie County authorities in the hope that they would prevail upon the Dallas authorities to dismiss this serious charge.

Moreover, prior to trial, Deputy Sheriff Huff and representatives of the District Attorneys' office interviewed Cook at length and rehearsed his testimony in anticipation of trial. As we will discuss in more detail below, on many contested points, Cook made statements that were wholly inconsistent with his April statement. Repeatedly, he was coached on how to respond to some expected cross-examination, and how to deflect other questions. These

sessions could not have encouraged prosecutors that their star witness would impress the jury.

Similarly, Farr possessed his own ticklish credibility shortcomings. He too had a drug habit. Indeed, he had used drugs and was in a stupor on the trip to Dallas that culminated in Mr. Banks' arrest. As with Cook, some jurors might wonder whether he was telling the truth or was falsely aiding the state to help himself. Moreover, prosecutors knew he was a professional informant, had provided important services in this case, and had been paid for those services. If jurors learned about that, some could easily conclude that Farr's testimony, from beginning to end, had been bought and paid for, and was plainly unworthy of belief.

These shortcomings presented prosecutors with several fateful choices. Given the importance of Cook and Farr to the state's case at each phase of trial, the law obligated them to disclose to the defense Mr. Farr's informant status as well as the fact that he was remunerated for his services. Additionally, given Cook's numerous recorded inconsistent statements, the law also required disclosure of both the April and September statements, as well as any arrangements with Cook and Dallas prosecutors about not dismissing the arson charge and habitual offender papers until after Mr. Banks' trial. But with disclosure came the clear peril that the jury would find the state's case too untrustworthy to support a capital murder conviction and sentence of death. For reasons known only to them, the prosecutors chose to breach their pretrial vow of full disclosure and to withhold all information about Mr. Farr, the September, 1980 Cook statement, and the arrangement that Mr. Cook's arson charge would be dismissed only if he performed "well" while on the stand. And for good measure, they also decided to forcefully and repeatedly assure jurors that these witnesses testified truthfully.

* * * *

In closing, the prosecution argued that the evidence showed clearly that Mr. Banks would be dangerous in the future and that it had easily proven the special issues. 10R at 2578-82. The defense argued briefly that this same evidence was insufficient. *Id.* at 2590-95. The jury found the state's evidence established the special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.

f. State Post-Conviction Proceedings: New Evidence

Prior to filing the instant federal *habeas corpus* proceeding, Mr. Banks filed three state post-conviction petitions, as state law then plainly allowed him to do. In the first two proceedings, no evidence of consequence to this proceeding was presented. In the third proceeding, an evidentiary hearing was held on two claims involving the jury, and additional evidence was presented by affidavit with regard to two other claims: the due process/suppression of material evidence claim and the ineffective assistance of counsel claims. That evidence will be discussed *infra* in the body of the argument on those claims.

g. Federal Evidentiary Hearing Evidence

On June 7 & 8, 1999, the Court conducted an evidentiary hearing, limiting evidence to be received to the due process and counsel claims, and allowed two supplemental affidavits relevant to the *Swain v. Alabama*, 380 U.S. 202 (1965) claim.

i. Due Process Claim Evidence

Mr. Banks called the surviving trial prosecutor, James Elliott, the lead investigator, Willie Huff, and state witnesses Robert Farr (by declaration), Ida Marie Martin, Carol Cook, Charles Cook, Marcus Jefferson, and Vetrano Jefferson. Through these witnesses, he sought to establish the following claims that the Director had denied:

* The prosecution knowingly and purposefully suppressed at trial the facts that Robert Farr served as an

informant for the prosecution in this case and was paid for his services. These facts were not disclosed to the defense prior to, or during, trial and were discovered only after federal proceedings commenced. Because critical portions of Farr's trial testimony at each phase of trial were misleading and untrue, as was the jury argument made by prosecutors in relation thereto, this error alone warrants full relief.

* The prosecution knowingly and purposefully suppressed at trial material impeachment evidence concerning Charles Cook that took at least two forms: (1) a long, incomplete pretrial interview statement, (FH Pet. Ex. B-4), containing vast amounts of impeachment material was not disclosed at trial and was disclosed only after this Court, at Mr. Banks' request, directed production of such material; and (2) information about highly favorable treatment law enforcement officials extended to Cook in exchange for his "favorable" testimony against Banks, the principle benefits being that no charges would be brought against Cook relating to the alleged disposal of evidence and that a then-pending felony charge and related habitual offender papers in Dallas County would be dismissed.

1. Evidence Relevant to Mr. Farr's Informant Status and Credibility

Four witnesses gave testimony concerning this allegation: Mr. Farr, Mr. Elliott, Mr. Huff, and Mr. Marcus Jefferson.

Mr. Farr testified by declaration that he worked as an informant for various police agencies, including Texarkana law enforcement agencies, before, during, and after Mr. Banks was arrested and prosecuted. *See* FH Pet.Ex. B-1 at 1.[2]

[2] Mr. Farr resides in California. Prior to the hearing, Mr. Banks moved that he be permitted to depose Mr. Farr or submit his declaration in lieu of live testimony for two reasons: Mr. Farr did not want to return to Texarkana because he feared for his life, given his prior services as a police informant, and he is in poor health. The Director did not insist that Mr. Farr be produced for cross-examination, and limited his objection to Mr. Farr's testimony solely to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), grounds. FH 13.

He was sometimes paid for these services. *Id.* Law enforcement in Texarkana and elsewhere knew of his use of illegal drugs and practice of falsifying prescriptions to procure drugs but never arrested him for these activities. *Id.* Farr testified that he became involved in this case after Deputy Sheriff Huff learned that Farr knew Banks and sought his assistance . . . .

* * * *

2. Evidence Relevant to The Existence of Non-Disclosed Impeachment Material Concerning Charles Cook

Pursuant to discovery ordered by the Court, the Bowie County District Attorney's office released portions of its file to Mr. Banks in advance of the hearing. Included in this disclosure was an undated, and apparently incomplete, transcript of a pretrial interview held between Charles Cook, Rodney McDaniel, and Charlie Leathers of the District Attorney's office, and Deputy Sheriff Huff. This interview was conducted shortly before trial. The transcript was offered and received into evidence. FH Pet. Ex B-4.

Mr. Elliott testified that this document was generated during interviews conducted shortly before trial. Mr. McDaniel, then an assistant district attorney, Mr. Leathers, and Mr. Huff were in attendance. Mr. Elliott examined handwritten notes on several pages of this exhibit and confirmed the writing was Mr. Raffaelli's and that Raffaelli possessed this transcript at trial. FH 45. Elliott conceded that he did not believe the transcript was turned over to the defense prior to or during trial. *Id.* at 45-47. The trial record

indicates that only Mr. Cook's April, 24, 1980 statement to police was disclosed to Mr. Cooksey at the conclusion of Cook's direct testimony. 9R 2312. Indeed, Mr. Elliott testified that he decided to disclose Ex. B-4 to Mr. Banks in these proceedings only to make sure that he complied with this Court's discovery order. FH at 69.

In his testimony before this Court, Mr. Cook confirmed that he spoke with law enforcement extensively about his testimony prior to trial. FH 135. He also said that much of his trial testimony was rehearsed and certain key portions were not truthful. *Id.* at 137-38, 144-46.

Findings of the Court

The Court concludes that Exhibit B-4 was in the possession of the prosecution at the time of trial and that it was not disclosed to defense counsel at any time prior to or during trial. The Court finds that this document was first disclosed to Mr. Banks in the Spring of 1999 as a result of discovery ordered by this Court. The Court also concludes that this document contains numerous statements made by Mr. Cook that are not consistent with his trial testimony, and that it contains passages where law enforcement officials coach him on how to present his testimony before the jury.

3. Evidence Relevant to Deal for Mr. Cook's Testimony

Several witnesses provided testimony that is relevant to this matter.

Mr. Elliott testified that he did not arrange a deal between his office and the Dallas County District Attorney's office concerning the arson charge that was pending against Mr. Cook at the time of Mr. Banks' trial. FH 52. He testified that Mr. Cook was Mr. Raffaelli's witness, and thus it was possible, but unlikely, that Mr. Raffaelli made a deal without his knowledge. *Id.* He testified that both Mr. Leathers and Mr. Huff had contact with Dallas authorities that he was not privy

to, but that Huff had no authority to strike any such deal. *Id.* at 54. He also testified that on the day after the trial concluded, he drove with Mr. Huff and Mr. Cook to Dallas, and spoke to the Dallas assistant district attorney who was assigned to Mr. Cook's arson case. *Id.* at 51-53 . He could not recall this prosecutor's name, but testified that he told this assistant district attorney that Mr. Cook had given helpful testimony for the prosecution in a capital murder case. *Id.*

Mr. Huff testified that he met with Mr. Cook in Dallas on three or four occasions prior to transporting him to Texarkana for trial, that he became familiar with the pending arson charge during the summer of 1980, and that he spoke to Cook about the charges. FH 80-82, 97-98.

* * * *

RESOLUTION OF LEGAL CLAIMS

I. PROSECUTORIAL MISCONDUCT [Claim J]

Mr. Banks alleges that systematic prosecutorial misconduct of the Bowie County District Attorney deprived Delma Banks of due process of law and compels a new trial. He charges a pattern of abuses perpetrated by the District Attorney that includes (1) the failure to disclose the status of Robert Farr, an important guilt-phase witness and the state's key witness at sentencing with regard to Delma Banks' alleged future dangerousness, as a paid government informant; (2) the suppression of highly probative documentary evidence that would have destroyed the credibility of the state's key guilt-phase witness, Charles Cook; (3) the denial of a deal with Charles Cook that resulted in the dropping of arson charges against Cook shortly after he completed his trial testimony and (4) the failure to correct perjured testimony from both Farr and Cook. Moreover, those violations of the well-settled *Brady* doctrine—which occurred despite the District Attorney's written assurances of full compliance with such requirements—were exacerbated by numerous instances of improper argument during the prosecution's closing

statements at the guilt and penalty phases that further deprived Delma Banks of a fair trial. The cumulative impact of the prosecution's unconstitutional behavior, combined with the overall weakness of the state's circumstantial case against Mr. Banks, require the reversal of the conviction and death sentence and the granting of a new trial.

a. Governing Legal Principles

As the Supreme Court has recently reaffirmed, "[t]he prosecution's affirmative duty to disclose evidence favorable to the defendant can trace its origins to early 20th century strictures against misrepresentation . . . ." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). The Court has repeatedly admonished that governmental deception of the court and jury, or knowing suppression of evidence favorable to the accused, represents conduct inconsistent with the most "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Those principles are "of course most prominently associated," *Kyles*, 514 U.S. at 432, with the Court's decision in *Brady v. Maryland*, in which the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87-88 (1963).

In subsequent cases, the Court has clarified the scope of the *Brady* doctrine and the showing a defendant must make to establish a violation. In *Giglio v. United States*, the Court explicitly held that nondisclosure of impeachment evidence, such as a promise of non-prosecution, may establish a

* * * *

Id. In this case, there is far more than "any reasonable likelihood" that had Farr been cross-examined about his motives for testifying and about his role in bringing about the trip to Dallas during which Banks allegedly retrieved a gun

for use in robberies, the jury's adjudication of Mr. Banks' future dangerousness would have been affected. Therefore, Mr. Banks' sentence of death must also be vacated.[5]

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[5] In the face of this overwhelming evidence of prosecutorial misconduct, the Director asserted at the hearing that Mr. Banks should be barred under *Keeney v. Tamayo Reyes*, 504 U.S. 1 (1992), from raising any facts concerning Robert Farr's informant status, because Farr might have been willing to recant his trial testimony and confess his informant status during state court proceedings. FH 13-14. The Director's argument is premised on the novel proposition that acknowledged *Brady* material should be sought from the suspected informant himself, rather than from the prosecutor. The practical import of the Director's position is clear: if courts were to apply *Keeney's* procedural default rule in cases where, as here, the prosecution has assured compliance with *Brady* requirements, defense counsel would be forced in all instances to operate under the assumption that the prosecutor was lying in order to exercise due diligence. Such a system would fly in the face of the well settled proposition that litigants may reasonably rely on the presumption "that public officials have properly dislodged their official duties," *Bracy v. Gramley*, 520 U.S. 899, 909 (1997), and would represent an outright deformity of the adversarial system.

The Supreme Court has recently had occasion to clarify the relationship between a prosecutor's duty under *Brady* and state rules of procedural default. In *Strickler v. Greene*, 119 S.Ct. 1936 (1999), the state had made assurances of *Brady* compliance by way of an open file policy in the prosecutor's office; nonetheless, potentially damaging impeachment material regarding one witness, contained in the police files, was not disclosed by the state and was not discovered by the defendant until federal habeas proceedings. The Fourth Circuit held that the petitioner's *Brady* claim was procedurally defaulted, because despite the prosecutor's assurances of compliance with *Brady*, the petitioner could have discovered the impeachment evidence during state habeas proceedings and therefore could not demonstrate "cause" for failing to raise the claim in a timely manner. *Id.* at 1947. The Supreme Court forcefully repudiated the Fourth Circuit's analysis, holding that in the presence of an explicit prosecutorial assurance of compliance with *Brady*, the petitioner could not be faulted for failure to discover suppressed evidence and had therefore established cause for the default. *Id.* at 1952. All the facts before this Court show the prosecution promised to disclose such evidence, purposefully elected not to do so, and that Mr. Farr became willing to

ii Suppression of Mr. Cook's September statement

The Court has already determined that this document, Petitioner's Ex. B-4, was possessed by the prosecution at trial and that it was not disclosed to the defense at that time, despite its pretrial assurance of disclosure of all discoverable material. Mr. Elliott acknowledged existing law required the disclosure of exculpatory and impeaching material. FH 25-26. It was first disclosed pursuant to this Court's prehearing discovery order. Moreover, the Court finds that the parties agree on the significance of Mr. Cook's credibility to the state's case in chief: he was their key witness.

The Court concludes that Mr Banks has demonstrated the materiality of Exhibit B-4. Indeed, had the defense had access to this document for its cross-examination of Mr. Cook, it is very likely that the jury would have possessed grave doubt about his veracity.

Mr. Cook provided state law enforcement officials with two statements prior to his testimony at Mr. Banks' trial—the first in April, 1980 and the second in September, 1980. The second statement frequently contradicted and gravely undercut the believability of the first statement. The state's failure to provide Cook's second statement to counsel denied Mr. Banks access to crucial impeachment evidence that would have provided the jury uniquely invaluable information upon which to evaluate Cooks' credibility.

As a general matter, Cook's testimony filled numerous evidentiary gaps that organize around four themes. First, Cook's testimony purported to generally follow April statement to the police, and, therefore, corroborate that statement. This was important because that April statement contained details about the murder that could have been told

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disclose both his status and the falsehoods of his testimony only after all state remedies were exhausted.

to Cook only by the murderer and was provided shortly after his first contact with the police, before the police could have fed him facts about the crime. Second, Cook's testimony described the circumstances surrounding Banks' arrival in Dallas. This testimony was critical because the time of his arrival provided the state with an apparently believable time-frame in which Banks could have committed the murder and driven to Dallas, and the description of the events surrounding his arrival abetted the inference that Banks had committed the murder.

Third, Cook's testimony provided the state with a confession that it otherwise lacked. Although it goes without saying that confessions are critical pieces of evidence, this confession was uniquely important because there was no apparent motive for the murder, the events precipitating the murder did not foreshadow a violent crime, and the State possessed no other evidence linking Mr. Banks to Mr. Whitehead's death. Finally, Cook's testimony provided a complete explanation as to why the state could not present physical evidence from the crime, such as the car, that would link Mr. Banks to the crime.

After careful review, the non-disclosed September statement contains voluminous evidence that Charles Cook's trial testimony was inaccurate, fabricated, coached, and, in some instances, simply a boldface lie. Its non-disclosure denied Mr. Banks access to evidence that could have rendered Cook not worthy of belief.

a. <u>The September Statement Reveals that Cook's April Statement was Tainted By Police Threats And Police-Supplied Details of the Crime</u>

Charles Cook first gave a statement to the police on April 24, 1980, FH Pet. Ex. B-2. That statement contains information about the murder that presumably could have

only been told to Cook only by someone with direct knowledge of the killer. Yet the non-disclosed exhibit contains evidence that could have led the jury to conclude that the law enforcement officers corrupted the April statement, first by threatening Cook with prosecution and then by giving him critical details about the crime. This information casts grave doubt as to the origin and trustworthiness of the information contained in the April statement.[6]

For example, Cook stated that when the police arrived at his house, Huff said, "you just gave this pistol to Delma Banks." FH Pet. Ex.B-4 at 16. According to Cook, Huff then said, "Did you know that Delma Banks was wanted for murder?" *Id.* Cook stated that after he responded affirmatively to this question, Officer Huff said, "[Y]ou mind telling us about it?" Cook then stated that before he responded, Huff said, "*We can get you to help us.*" *Id.* (Emphasis added).[7] As a result, Cook stated that he agreed to cooperate with Officer Huff. *Id.* Finally, while describing these events, Cook identified Huff by name.

The undisclosed statement also reveals that Cook initially maintained that the police had not assisted him with his statement. But only minutes later, he acknowledged that he was given significant details about the murder. In that regard, Assistant District Attorney McDaniel, after listening to Cook recount his story, asked, "Did the police officers sit down and discuss what all they knew about the case before you gave your statement?" *Id.* at 19. In response, Cook said, "No sir."

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[6] As previously noted, Charles Cook testified before this Court that the April statement was misleading and inaccurate and included significant portions that were provided to him by Mr. Huff shortly after he first met Huff in the early morning hours of April 24.

[7] At the hearing, both Cook and Huff agreed that Cook was frightened during this meeting. Cook explained that he was scared because he feared that he would be implicated in a murder and wanted to avoid that at all costs. *See* FH at 141-42.

Id. Thereafter, McDaniel, said, "They just told you to sit down and write it." *Id.* Again, Cook said, "Yes sir." *Id.* McDaniel asked one last time, "And nobody helped You?" *Id.* Cook maintained his position, stating "No. Sir. I was in a room by myself." *Id.*

In response to McDaniel's additional probing, however, Cook contradicted his previous position, stating on three different occasions that he knew the exact date that Banks had first come to Dallas (April 12, 1980) because *the police had told him* the date of the murder prior to his giving this statement. *Id.* at 19-20. Additionally, Cook stated that prior to his giving his statement, *the police had also told him* when the murder had taken place, and specifically referred to the murder victim as a "white boy." *Id.* at 20.

Cook did not acknowledge that he was threatened at his house or that the police had assisted him with his statement. Cook did, however, testify to contradictory events, indicating, for example, that he remembered the date Banks arrived in Dallas because the previous week was Easter, and that he did not remember the names of any of the officers who were at his house that night. 9R 2285; 2306.

b. <u>The September Statement Reveals that Cook's Trial Testimony was Rehearsed, Coached, Inconsistent, and, Untruthful</u>

Mr. Cook testified at trial that he had never spoken to *anyone* about his testimony and that Mr. Raffaelli put him on the stand without knowing what he would say. 8R 2314. This was a lie. The non-disclosed September statement unequivocally contradicts this testimony. It reveals a pattern whereby the prosecution team repeatedly altered critical elements of Charles Cook's testimony that were either not consistent with his original police statement or were not to their liking, and, thereafter, replaced them with a version of events that was

extremely helpful, if not absolutely necessary, to the success of their case.

i. The Events Surrounding Banks Arrival in Dallas

Cook began his trial testimony by stating that Banks arrived in Dallas on Saturday, April 12 between 8:00 and 8:30 in the morning and that he independently remembered the date because the previous week was Easter. 9R 2285. Prior to trial, however, Cook stated that he was able to determine the date only because *the police had told him* the date that Whitehead was murdered. FH Pet. Ex B-4 at 20. Immediately thereafter, Cook testified that Banks asked him whether he would take him to a motel because he did not know anybody in Dallas. 9R 2287. In Cook's practice sessions, however, Cook stated the exact opposite—he offered to take Banks to a motel. FH Pet. Ex B-4 at 5.

Cook testified at trial that he saw blood on Banks' pants shortly after they dropped of Cook's wife at work, and that as a result, once they arrived back at Cook's house, he offered Banks a change of clothes. In the April statement, however, he stated that he saw the blood only *after* he took Banks back to his home and *after* Banks changed clothes, which, of course, would be highly unlikely. Initially, during the pre-trial sessions, Cook stated that he saw the blood on Banks' pants after he (Banks) took Cook's wife to work that morning. FH Pet.Ex.B-4 at 5. In response to these discrepancies, Assistant District Attorney McDaniel berated Cook, asserting, "Your statement [to the police] is obviously screwed up." *Id.* at 24. Moreover, McDaniel said, "It does not make any sense that he changed clothes and you got back into the car went ridding and then you noticed blood on his pants because if he changed clothes he wouldn't have had any blood on his pants." *Id.* Finally, McDaniel provided specific advise on how to handle this problem if it arose at trial. He said, "[T]hey are going to ask you about it and you are just going

to have to explain it. That you might [sic] a mistake and you got your facts out of sequence." *Id.* at 24.

Immediately thereafter, once McDaniel had "corrected" the sequencing of when Cook had given Banks the clothing, he questioned Cook about still other contradictory statements that Cook made about the color of the clothing. *Id.* at 24. Initially, during Cook's pre-trial testimony, Cook stated that "[he] put him in a pair of blue pants," and "a [blue] flowered shirt to go with [his] blue pants." Previously, in Cook's April statement, however, Cook gave a different account, stating that he gave Banks a brown pair of pants and blue shirt. McDaniel, therefore, told Cook, "Your statement right her [sic] says I put him in some brown paints and a blue shirt. You told me you put him in bloue [sic] pants a blue flowed shirt." *Id.* In response, Cook acknowledged that his April statement was incorrect. *Id.*

Shortly thereafter, leaving nothing to chance about the color of the clothes at trial, McDaniel told Cook how his statement should read; "Anyway, *the way this statement should read is that* . . . on the way back [from the hotel] you noticed blood on [Banks'] pants so you took him home and changed his clothes[.]" *Id.* at 26. (Emphasis added). Apparently, Cook got the message. At trial, Cook testified to that order of events, and, furthermore, avoided giving any description of the clothing. 9R 2281-2291.

ii. The Confession

At trial, Cook testified that Banks confessed to him. The pre-trial practice sessions reveal gaping inconsistencies between the version of events presented at trial and the version explored prior to trial. For example, when first discussing the events that immediately preceded the confession, Cook did not mention that he had told Banks that he had been to jail two times and that he did not want any trouble in his home. *Id.* at 8-9. Additionally, Cook gave a

conflicting account on the number of times that Banks told him that he shot Whitehead. *Id.* According to Cook, "[Banks] say [sic] took out the 25 automatic and shot him . . . he said pow and shot him again . . . and he shoot [sic] him again to make sure he [sic] dead." *Id.* at 8. Immediately thereafter, McDaniel, recognizing that the statement was inconsistent, said, "Okay, I want you to go back over all that again. Tell me again what all he told you." *Id.* Cook, once again, indicated that Banks told him that he shot Whitehead three times. *Id.* at 9.

Finally, Cook gave a different motive for the killing than he gave at trial. During Cook's pretrial sessions, he said on at least two different occasions that Banks killed Richard Whitehead because Banks wanted to steal Whitehead's car. Cook initially said, "I say why you shoot the man? Why you do it like that man? [Banks] said uh I don't know man I wanted his car man." *Id.* at 9. McDaniel, in response, said, "Say that again. I don't think it came in on the tape." *Id.* Cook responded, "I say man why you shoot the boy? Why do you do it like that man? [Banks] said man I don't know man I wanted his car." *Id.*

Although Cook was asked to repeat his testimony on more than one occasion, he failed to mention the reason why Banks confessed to him, but nonetheless volunteered this information in his initial statement to the police. Likewise, although Cook maintained on two separate occasions that Banks told him that he killed Whitehead because he wanted to steal his car, Cook told the police that Banks told him that he killed Whitehead "for the hell of it." Finally, although Cook maintained on two separate occasions that Banks told him that he shot Whitehead three times, Cook told the police Banks told him that he shot Whitehead four times.

Aware that these discrepancies would allow the defense to seriously undermine Cook's credibility, McDaniel took corrective action. After Cook was finished going over

statement for the first time, McDaniel read him the part of his April statement in which Cook said to Banks "tell me the truth because I've been to prison two times[.]" *Id.* at 27. Thereafter, McDaniel said, "[N]ow, I just asked you to go over twice exactly what was siad [sic] between you and [Banks] and you left that out. You didn't say anything about having, you telling him you've gone to prison two times. Did you tell him that you been to prison two times?" *Id.* In response, Cook responded affirmatively. *Id.*

Additionally, and immediately after this question, McDaniel said, "And then you said, I can't stand no kind of trouble at all. Red said, 'Man, me [in] this white boy was in the woods in Texarkana drinking when [sic] I thought about killing him and taking his car to Dallas just for the hell of it.'" *Id.* at 27-28. Noticing that this part of the statement was both inconsistent and incomplete in comparison to the early story that Cook just told him, McDaniel said, "You realize that I just read you is different that [sic] what you told me before?" *Id.* at 28. Cook responded by stating, "Yes, sir." *Id.* Thereafter, McDaniel said, "what's different abot[sic] it?" After correcting several other parts of the statement, however, Cook maintained, once again, that Banks killed Whitehead for his car and did not state anything about Banks wanting to kill Whitehead for "the hell of it." *Id.* at 28. Notwithstanding, someone later placed blocks (i.e., "[]")around the words "just for the hell of it." *Id.*

Finally, McDaniel read the portion of the April statement in which Cook indicated that Banks told him that he shot Whitehead four times. *Id.* at 28-29. Thereafter, McDaniel said, "Now a minute ago I asked you how many times you thought that he shot the boy." *Id.* at 29. After listening to the version in the April statement, Cook said, "Yah, four times." *Id.* McDaniel said, "And you told me you thought three. According to this statement, it sounds like he shot him at least four[.]" *Id.* Providing no direct response, Cook said only,

"Yah, right[.]" *Id.* Sensing that Cook did not know the answer to the question, McDaniel said, "I know that you don't know how many times he shot him[.]" *Id.* Thereafter, Cook acknowledged that McDaniel was correct.

As a result of these pretrial sessions, Cook's trial testimony became more or less consistent with the April statement. Cook stated, therefore, that prior to the confession, he told Banks that he had been to jail two times. 9R 2295. Additionally, Cook stated that Banks told him that he decided to kill Whitehead for the hell of it. *Id.* Finally, Cook stated that Banks told him that he shot him four times. *Id.* at 2126-27.

According to Cook's trial testimony, moreover, immediately after Banks' confession, Cook asked Banks "what he was going to do and [Banks] said he didn't know." *Id.* at 2127. Cook testified that he then said, "well you can't stay here now[.]" but that Banks refused to honor his request, stating "let [me] think about it[.]" *Id.* Refusing to back down to Banks, Cook responded, "You can't stay[.]" However, at that very moment, when Cook was getting ready to kick Banks out of his home Cook testified that he, *for the first time*, noticed that Banks had a gun. *Id.* Cook stated that "[He] was afraid, and [he] left out [sic] of the room and told him to get some rest, think about what he was going to do, you know." *Id.* at 2127-28.

However, in Cook's police statement, he stated that he saw the gun prior to the confession, and, moreover, never mentioned that Banks' threatened him. Even more contradictory, when Cook recounted the events that took place immediately after the confession, Cook never mentioned anything about seeing Banks' gun that night. FH Pet. Ex. B-4 at 9 & 10. Cook then went on to describe the events that took place the next day, indicating that Sunday night he took Banks' gun from him because he wanted to protect his family. *Id.* at 11. After hearing this statement, McDaniel

inquired whether Cook had ever seen the gun before that night. *Id.* Cook responded by stating that the first time he saw the gun was in the console of the car on the morning that Banks arrived in Dallas. *Id.*

Moreover, when McDaniel told Cook that his pre-trial statements were inconsistent with his April statement and asked him whether he could tell him what was wrong with his pre-trial statement, Cook said he did not tell him that he saw the pistol in the console of the car. *Id.* at 28. And yet again, Cook stated not only that he saw Banks' pistol that morning in the car, but that he showed Banks his gun in order to demonstrate that he was not intimidated. *Id.* at 35-36.

The version Cook told at trial is the version that was most helpful to the State's case. This testimony allowed the jury to find that Banks confessed to Cook because it demonstrated that Cook's reaction to Banks' confession was credible. Most importantly, although Cook never seemed to get the story right during the pre-trial sessions, the fact that Cook told the best—and drastically different—version at trial, strongly suggests Cook received additional assistance.

iii. The Disposal of Physical Evidence

Cook went on to testify that he disposed of all of the physical evidence from the crime that Banks brought to Dallas. This was not consistent with remarks made during the pre-trial sessions. For example, although Cook consistently stated that he got rid of the car that Banks was driving, he gave conflicting accounts of the events surrounding the disposal. During the pre-trial sessions, Cook stated that he left the car on "Town Drive." FH Pet Ex. B-4 at 16. Additionally, Cook first stated that he left the car keys in the ignition. *Id.* at 12. Nevertheless, in his April statement, Cook stated he left the car at "Canna Drive," and, furthermore, that he left the car keys under the seat. FH Pet Ex B-2 at 2.

Once again, after Cook finished going over his statement, McDaniel later returned to interrogate him about these two inconsistent statements. McDaniel read Cook his April statement that contained this testimony; McDaniel, however, either did not mention the name of the street or the information was not transcribed.[8] Thereafter, McDaniel said, "Now a minute ago you left the keys in the ignition." FH Pet. Ex B-4 at 30. Going along with the version that was consistent with his statement to the police, Cook said, "I left them up under the seat." *Id.* at 30. Then McDaniel said, "Which one is it[.]" Cook then responded, "I left them under the seat." *Id.* at 30.

Cook's pre-trial testimony regarding the events surrounding the selling of items that were in the car is equally problematic. In Cook's April statement, he indicated that the day after Banks left Dallas, in addition to dumping the car, he sold car's radio, booster cables, and tool box and Banks' pistol to his friend across the street. In Cook's pre-trial statement, however, he made several statements that were inconsistent with his police statement.

For example, Cook stated that Banks sold the car's radio. *Id.* at 13. Additionally, when McDaniel asked Cook when he sold the items, Cook gave a contradictory and internally inconsistent statement, initially indicating that "[he] didn't sell the gun until that Wednesday." *Id.* As a result, McDaniel continued to query Cook about the date, at which point Cook said for the second time that he sold the items on Wednesday. *Id.* Notwithstanding, McDaniel continued to probe Cook on this issue, asking "[A]nd after after [sic] you put him on the bus that Monday afternoon . . . did you take the booster cables, the tool box, and the pistol all over to Bennie at once

[8] The pre-trial statement reads: "[T]he next morning around 6:00 I took the hot car and left it at the end of ____Drive with the keys under the seat." P/Tr 30.

or did you take them over there at different times." *Id.* at 14. Cook responded, "I took 'em over there at once." *Id.* McDaniel then returned specifically to the date: "And what day was that?" Cook changed his response, saying, "This was on a uh it was on a Tuesday instead of a Wednesday. It was on a Tuesday 'cause it was the next day after[.]" *Id.*

Before Cook could finish his sentence, however, McDaniel interrupted, "it was the same day that you dumped the car." *Id.* Cook, however, said, "It was the next day after I dumped the car[.]" which, despite Cook's changing of the date to Tuesday, would have meant that it was actually Wednesday. McDaniel, therefore, said, "You dumped the car Tuesday morning before you went to work." *Id.* at 14. Returning to Tuesday, which would have made Cook's previous statements incorrect, Cook said, "Yeah it was that Tuesday evening." *Id.*

Thereafter, McDaniel moved the questioning along to other matters. After questioning Cook about his other inconsistent statements, McDaniel returned to the question of whether Cook or Banks sold the car's radio. McDaniel, said, "Now you told us that Delma sold that cassette . . . [.]" *Id.* at 30. Cook maintained this position, "Yah, well he sold it to Benny, must have sold it to Benny[.]" *Id.* Again, McDaniel asked, "Well did you sell it to Benny or did he sell it to Benny?" *Id.* Cook said, "Well, he sold it to Benny." As a result, McDaniel asked, "Your statement that you sold it . . . That's not right?" *Id.* Cook said, "No[.]" *Id.*

At trial, therefore, Cook never mentioned anything about where he left the car keys, and, moreover, stated that he left the car on "Canada Drive." 9R 2303-2314. Additionally, Cook stated that he sold his neighbor the gun that Tuesday evening. *Id.* at 2305. Finally, Cook indicated that he sold Jones a green tool box and a set of battery cables, but did not mention anything about a car radio. *Id.* Cook's trial testimony, therefore, would indicate not only that McDaniel's

assistance in the pretrial testimony greatly assisted Cook, but also, given the fact that Cook never seemed to get the story right, that Cook subsequently received additional assistance.

iv. The B-4 is only a Snapshot of Police Abuse

Although Pet. Ex B-4 unquestionably demonstrates that the prosecution withheld information that could have been utilized to destroy the credibility of its most important witness, it also reveals that similar events took place both before and after the instant violation. While Cook's statement suggests these events, the court need only look to the state's own statements to determine that the state withheld information and coached Cook's statements pervasively. After going over all of the aforementioned problems in the statement, McDaniel said, "You are going to get on the stand just like you did this morning." *Id.* at 32. Notwithstanding McDaniel's comment that Cook would be, *once again*, on the stand, all indications from this statement suggest that this conversation did not take place *in a court room*. For example, the first page in the transcript indicates that there were three people in the "room" and, moreover, McDaniel said, "why don't ya'll shut that door, Willie." *Id.* at 1, 22. The inference from McDonald's statement, therefore, is that there were other conversations with Cook in a court room.

Additionally, and perhaps more revealing, during this same period of the testimony, McDaniel said to Cook, "Now, tell me *again* about running into Delma in the jail [sic] in Dallas." *Id.* at 32. Notwithstanding McDaniel's precise question and request that Cook repeat his story, no other reference exists in *any* court document (limiting these documents, of course, to the ones that the State has disclosed) to Cook running into Banks, and, therefore, absent prior communication, such a question would have been impossible. Finally, McDaniel told Cook, "[W]e have gone over what is wrong with the statement and *they will go over and that some more* when get,

[sic] before you testify." *Id.* This last statement, therefore, confirms that Cook would receive still more assistance prior to his testimony.

Likewise, several aspects of Cook's own testimony suggest that there were prior and subsequent conversations with McDaniel and others on the prosecution team. For example, throughout these pre-trial sessions Cook maintained that he saw Banks' gun on the first day that he visited Dallas. However, when Cook testified at trial, his testimony was dramatically different. Additionally, there are numerous other examples cited within the aforementioned testimony that show that Cook's testimony at trial was dramatically different than his pre-testimony. Such a stark changes in testimony, therefore, cannot be considered gratuitous events that happened to benefit the state, but rather the result of a deliberate effort to alter Cook's testimony.

The Court has reviewed the undisclosed statement in some detail. It reveals a literal treasure-trove of inconsistent statements. Moreover, its contains numerous instances where law enforcement officials literally break down and reassemble Cook's narrative so that it rings true and avoids embarrassing cross-examination. Given the importance of Mr. Cook's credibility to the question of whether Mr. Banks is guilty of capital murder, it would be hard to imagine a pretrial statement that could be more significant than does this one.

The prosecutor's decision to withhold this document prevented the jury from playing its most important role—determining the credibility of the state's key witness. It also denied Mr. Banks a fundamentally fair trial.

iv. The Prosecutor's Closing Arguments Compounded These Abuses

The prosecution's repeated use of improper and inflammatory arguments during both the guilt and penalty phases of this trial requires the reversal of Banks' conviction

and sentence as well. A conviction must be reversed if improper prosecutorial argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. De Christoforo*, 416 U.S.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed May 31, 2000].

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITIONER'S OBJECTIONS TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN MAGISTRATE JUDGE REPORT

DELMA BANKS, JR., by and through undersigned counsel, respectfully files these objections to the report and recommendation entered in this case on May 11, 2000, and served upon counsel on May 15, 2000.

Introduction

The report and recommendation of the Magistrate Judge (herein "Report") concludes that Mr. Banks is entitled to relief from his capital sentence on two independent grounds, but rejects Mr. Banks' arguments that he is also entitled to relief as to his conviction.

* * * *

doctor to establish that all of the relevant information from the autopsy process virtually rules out a 4:00 am shooting and establishes a later time when Mr. Banks was in Dallas.

Mr. Banks objects to the Report's summary conclusion that counsel was not unreasonable in not developing the evidence that Mr. Banks presented through Mr. Fisher and Dr. Riddick. Establishing that the state's time line was unreliable was absolutely essential to Mr. Banks defense on capital murder. Given that the defense would not dispute the state's evidence that showed Mr. Banks and Mr. Whitehead together on the evening of April 11, and then in Dallas with Charles Cook the following weekend, the time of death and how Mr. Banks traveled to Dallas were critical issues. The record establishes that trial counsel made absolutely no effort to develop this evidence.

The Report concludes that trial counsel's performance in challenging Charles Cook's credibility was reasonable. Report at 16-17. Mr. Banks objects to this finding because the record shows that trial counsel made no effort to prepare his examination prior to trial and fails to address the most important evidence on this point: the prosecution's failure to disclose Petitioner's Hearing Exhibit B-4, Mr. Cook's September, 1980 pre-trial statement. The suppression of this statement, which is loaded with impeaching material, prevented trial counsel from demonstrating that Cook's incriminating testimony was not believable.

4. *The Report Errs in Finding Charles Cook's Recantation Not Credible.*

Mr. Banks objects to the Report's summary finding that Mr. Banks' recantation is not credible and to the application of the law. Report at 17.

There is much record evidence to support Charles Cook's sworn testimony that his trial testimony was coached, that his initial statement to police was the product of fear and contained numerous falsehoods, and that he testified falsely at trial so that his pending arson charge in Dallas would be dismissed. Mr. Banks objects to this finding because the Report discusses none of this evidence.

For example, Petitioner's Exhibit B-4, Mr. Cook's lengthy recorded pretrial statement which was not turned over at trial but was provided to Mr. Banks in this proceeding as a result of the Magistrate Judge's discovery order, provides abundant corroboration that Deputy Huff and members of the District Attorney's office spent hours with him shortly before trial coaching him on how to present his testimony. This document confirms that Mr. Cook is truthful when he claims his testimony was coached. See Proposed Findings at 50-58.

Other evidence not addressed in the Report corroborates Cook's assertion that his initial April, 1980 statement to law enforcement was heavily influenced by the dire circumstances under which it was taken. The events that preceded Mr. Cook giving the first statement are harrowing. Deputy Huff and several other officers entered his home in pre-dawn hours. They did not know who he was but suspected that he, at the very least, had destroyed evidence or aided and abetted Mr. Banks. Not surprisingly, they made it clear to him that he was in big trouble unless he cooperated fully. During a forty-five minute meeting prior to being taken downtown, Cook was given considerable information about the crime. See Proposed Findings at 48-50. It is not surprising that these events scared the wits out of Cook, as both he and Huff acknowledged at the hearing, and that under these circumstances, Cook would choose to include bogus material in his statement to please the police. Moreover, at this time, he was on probation and was a regular drug user.

The Report fails to weigh and consider the wealth of record evidence that corroborates Cook's recantation. This evidence is discussed at length in Petitioner's Proposed Findings at 24-29. The Report considers none of this evidence and instead misapplies the rule that the law looks with suspicion on recantations. Report at 17.[9]

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[9] The Report cites *Spence v. Johnson*, 80 F.3d 989 (5th Cir. 1996) as providing the governing rule. *Spence* applies the rule in the usual context:

* * * *

b. *The Reports errs in failing to consider the merits of the other argument claim.*

The Report concludes that the state court's conclusion that trial counsel defaulted review of improper arguments at both phases of trial forecloses review in these proceedings. Report at 40. This is error.

The improper comments made by the prosecutors during both their g ilt and punishment phase arguments are not few and isolated but are numerous and were made purposefully.[13]

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an acquaintance or former co-defendant of the petitioner recants his or her testimony in later proceedings and little independent evidence corroborates this change. The facts here are vastly different. Charles Cook did not know Delma Banks prior to April, 1980, and has not seen or heard from Mr. Banks since the trial. For years Cook refused to speak with representatives of Mr. Banks, and finally agreed to do so only with great reluctance. He had no motive to help Petitioner; his recantation could only work to his detriment. He appeared at the June, 1999 hearing only because he was under subpoena, and broke into tears during his testimony when he admitted that significant portions of his trial testimony were not truthful. His assertion of being coached does not stand alone but is confirmed by Petitioner's Exhibit B-4; his claim that he testified untruthfully in part to please the prosecution because of his liability on the pending arson charge is corroborated by his sister Carole Cook's testimony in which she, who was also a state's trial witness, testified that Deputy Huff forced her to change her testimony, as well as by his former wife, Ida Martin, with whom he has very little contact, who testified that the state allowed Cook conjugal visits with her each day prior to his testimony to insure that he remained a cooperative state's witness. Thus, while the law does look with suspicion upon recantation, at the s me time it recognizes that some witnesses do lie at trial. Recantation evidence that has independent corroboration is not suspect evidence. Looking at the record facts as a whole, there is much corroboration for Mr. Cook's 1999 testimony. *See Brown v. Wainwright*, 785 F.2d 1437 (11th Cir. 1985); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991); *Ex Parte Frazier*, 562 So.2d 560 (Ala. 1989).

[13] See Petitioner's Proposed Findings at pp. 60-68 for a full discussion of this issue.

Given their content in the context of this generally weak case, it was unreasonable for counsel to make no objection whatsoever to the remarks. Counsel was ineffective for allowing these comments to go to the jury and their consideration was harmful to Mr. Banks. The Report errs in concluding that Mr. Banks has not shown cause and prejudice for this default.

2. *The Suppression of Favorable Evidence Allegations.*

The Report contains a number of errors in the resolution of these claims.

First, Mr. Banks pleaded in his petition that the prosecution withheld material exculpatory and impeaching evidence. Events thereafter confirmed these assertions. Pursuant to the Magistrate Judge's discovery order and allowance of an evidentiary hearing, Mr. Banks was able to demonstrate that (1) Robert Farr was in fact a paid informant who made significant misrepresentations to the jury during both phases of trial, and (2) the trial prosecutors suppressed at trial a lengthy, pretrial statement made by key witness Charles Cook to law enforcement just prior to trial that contains a wealth of impeachment material as well as evidence that confirms that he was coached and pressured to testify falsely. See Petitioner's Exhibit B-4.

With regard to the Report's treatment of Robert Farr, Mr. Banks objects to two points. The Report finds that "Huff testified that Farr told him Banks was going to get the gun in order to commit armed robberies." Report at 43. This is error. Huff testified that he did not know why Banks was going to get a gun. F.H. at 88. The Report further finds that the non-disclosure of Farr's informant status did not prejudice Mr. Banks during the guilt phase of trial. Mr. Banks respectfully disagrees. The non-disclosure allowed the prosecution to perpetuate a hoax upon the jury: it presented Farr as a disinterested, good citizen witness when in fact he was a professional paid informant. Given the many problems that the state had with its case, disclosure of this factor would

have provided the jury with a strong reason to distrust the state's case, and to wonder whether similar considerations had been offered to Charles Cook. Viewed against the entire record, there is a reasonable likelihood that the jury would have reached a different guilt verdict had the disclosure been made.

With regard to Charles Cook, the Report make no mention or finding as to the non-disclosure of the pretrial statement.[14] This statement, produced only as a result of the Magistrate Judge's discovery order, contains a treasure trove of impeachment material, and compelling evidence that Cook's initial statement in April was contaminated by police threats and police-supplied details of the crime. It also shows that Cook's trial testimony was thoroughly rehearsed, coached and inconsistent with earlier statements.

Mr. Banks is entitled to full relief on the suppression of this statement. Moreover, the failure of the Magistrate Judge to consider this evidence also taints the Report's finding that Cook's recantation is not credible. Mr. Banks objects to the failure of the Magistrate Judge to consider this evidence.

The Report also concludes that Mr. Banks failed to establish that the prosecution suppressed evidence that at the time Charles Cook testified, he reasonably believed that if his testimony pleased the state the trial prosecutor would take action to see that his Dallas arson charge was dismissed. Report at 44-46. This is error.

The Report finds it significant that Cook had given the general substance of his trial testimony to law enforcement prior to picking up the arson charge. The Director and the Report make too much of this fact. Charles Cook had two main worries during the spring and summer of 1980. The first

[14] Given the importance of this material, Mr. Banks' Proposed Findings addresses this issue in detail. See Proposed Findings at pp. 46-60.

arose when the police entered his home in the early morning hours of April 23, and told him that he could be prosecuted for destroying evidence if he did not fully cooperate with them. As a drug addict and probationer, these events scared Cook half to death. Thus, at the time that he gave his initial statement later that morning, he had a legitimate concern about becoming a defendant in this matter as an accessory or aider and abetter. (The record contains law enforcement declarations only to the effect that Cook was never a suspect *in the murder* of Mr. Whitehead, not that he could not be charged with having aided and abetted Mr. Banks or having unlawfully disposed of evidence). His second concern arose with his arrest and detention on the arson charge, and the refusal of the Dallas authorities to dismiss the charge despite his sister-complainant's desire that the case not be prosecuted. This anxiety grew when Dallas authorities later inexplicably filed habitual offender papers that significantly lengthened Cook's possible sentence in the matter a month prior to Mr. Banks' trial.

The Report also appears to credit the trial prosecutor's denials of any deal with Cook. Mr. Banks objects to this finding because it neglects to consider strong evidence that these views are not credible. There is considerable undisputed evidence in the record that the trial prosecutors engaged in repeated acts of misconduct to ensure that Mr. Banks would be convicted and death sentenced. For example, prior to trial, the prosecutors promised to voluntarily disclose *Brady* material in advance of trial. This promise was breached when they failed to disclose, inter alia, Mr. Farr's informant status as well as Mr. Cook's long pre-trial statement. In the face of clear law forbidding the practice, on the eve of trial, the prosecutors moved ex parte and without notice to counsel for an order allowing deputies to drive Mr. Banks from Texarkana to Dallas so that state expert witness Dr. James Grigson would perform an examination for future dangerousness. The Fifth Circuit had expressly condemned this practice as

violating the Fifth Amendment silence right and the Sixth Amendment right to counsel one year earlier,[15] and on the week after Mr. Banks' scheduled trial, the Supreme Court of the United States would hear argument in a case involving this practice.[16] During trial, the prosecutors sat (unprofessionally) silent when their key witnesses Farr and Cook lied to the jury,[17] and compounded the effect of these falsehoods by expressly assuring the jurors that both witnesses had told them the truth. Given this pattern of misconduct and misrepresentation, Mr. Banks believes the prosecutor's assurances of no deal should count for little, and that the many circumstances suggesting a deal be credited.

This pattern of deception seen at trial continued into post-conviction proceedings, and provides still more reasons to reject, not credit, the Director's claim of no deal. In the third state habeas proceeding, Mr. Banks pleaded, as he did in this proceeding, that Farr was a paid informant and that the prosecution knowingly suppressed this fact. We now know that Farr was in fact a paid informant. But in state habeas proceedings, the Director, represented by trial prosecutor Elliott, remained silent on this claim. While he had a duty to answer the allegation truthfully, he chose to make no representation.

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[15] *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979).

[16] *Estelle v. Smith*, 451 U.S. 454 (1981). The Court unanimously held that requiring a capital defendant to submit to interview with a state's mental health professional for the purpose of gathering evidence on future dangerousness in the absence of notice to counsel was a clear Sixth Amendment violation, and a strong majority of the Court found a Fifth Amendment violation as well.

[17] For example, Farr directly mislead the jury was he denied receiving any benefit for his testimony. Cook similarly lied when he denied that he had ever spoken to prosecutors about his testimony prior to taking the stand. In both instances, the prosecutors had a clear duty to correct the misrepresentations. They did not do so.

The Report credits Mr. Elliott's "no deal" representations in this same state habeas proceeding as corroborating his 1999 testimony. They do no such thing. For example, before this Court, Mr. Elliott explained how immediately after the trial, he traveled to Dallas and spoke to an assistant district attorney whose name he had forgotten, but who was assigned to Mr. Cook's arson case, to put in a good word for Mr. Cook. Before the state court, he made no such assertion. Before the state court, he filed an affidavit from a Dallas assistant district attorney named Kevin Bryne, who the Magistrate Judge appears to find was the assistant on the arson case. While it was Mr. Elliott's intent before the state court to pass Mr. Bryne off as the Dallas prosecutor who handled the arson case, close inspection shows that Mr. Bryne was not involved in that case. He handled a case that Mr. Cook picked up in 1981, *after* his testimony in Mr. Banks' case. Mr. Elliott's adding and subtracting before this Court to and from his state court representations on the very same issue provide more reasons to discredit rather than accept this testimony.

Further, Mr. Banks objects to the Report's conclusion that only Cook offered evidence of a deal or threats. The record shows that Mr. Raffaelli had conversations with the Dallas County prosecutors about Mr. Cook prior to trial, and Mr. Elliott confirmed that he visited them immediately after trial to report that Mr. Cook's testimony was valuable. Deputy Sheriff Huff conceded that he discussed the pending case with Mr. Cook. Carol Cook testified that Huff told her that he could see to it that her brother would spend a long time in prison on the Dallas charge. Ida Marie Martin, Cook's former wife, testified about conjugal visits during the trial. All of these circumstances corroborate Mr. Cook's testimony that he fully expected to be rewarded with dismissal of the Dallas charges if his testimony pleased the Texarkana prosecutors. His only surprise concerning this matter was that the case was dropped so quickly after his testimony. Given all of these

circumstances, the Report errs in concluding Mr. Banks failed to establish that Mr. Cook either had a deal, or possessed a reasonable basis to believe, that favorable testimony for the prosecution would led to dismissal of the arson charge.

In footnote 13, the Report finds that no state witness committed perjury and that the prosecutors were not aware of any false testimony from state witnesses. Report at 46. This is plainly wrong. For example, the record shows clearly that the prosecutors knew Farr was a paid informant; when he denied receiving any benefit for his testimony, the prosecutors knew this was untrue. When Charles Cook testified that he had not spoken to law enforcement officials about his testimony prior to trial, the prosecutors also knew this was not true. No only did the prosecutors make no effort to require each witness to correct their testimony, they compounded the prejudice by assuring the jurors that each witness had told them the truth.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.

Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

MOTION TO ALTER OR AMEND JUDGMENT & MOTION FOR ORAL ARGUMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Delma Banks, Jr., respectfully moves the Court for an Order that alters or amends the judgment that was entered by the Court on August 18, 2000. Additionally, he moves for an Order setting a hearing on this motion to allow for oral argument in its support. In support of these requests, Mr. Banks states as follows:

1. On August 18, 2000, the Court filed a Memorandum Opinion and Order and Final Judgment in this matter. Except as noted in the memorandum opinion, the Court adopted the Report entered by Magistrate Judge Malone on May 11, 2000.

* * * *

THE COURT SHOULD AMEND ITS JUDGMENT

Reason No. 1: The Court Did Not Resolve the Important Question of Whether the Prosecution's Failure to Disclose Charles Cook's Lengthy, Eve-of-Trial Interview Violated Due Process

5. There is no disagreement among the parties over the importance of state witness Charles Cook's credibility to the state's case for conviction.[4] If the defense could have provided the jury with sufficient reason to doubt his credibility, the jury most likely would have voted to acquit.

6. Well before trial, the prosecution promised the defense that it would turn over in advance of trial all discoverable material. This promise included exculpatory and impeachment material. It has now been established that prosecutors possessed two pretrial statements concerning Charles Cook, one given in Dallas in April, 1980, Petitioner's Exhibit B-2, and another lengthy one taken in Texarkana just prior to trial. Petitioner's Exhibit B-4. At trial, after Cook testified and delivered the state's most critical evidence—Mr. Banks had confessed to him to shooting Richard Whitehead—prosecutors chose to provide defense counsel with only one—the April statement. *See* Petitioner's Exhibit B-2.

7. Prosecutors did not disclose the much more detailed statement that Cook gave during the weekend prior to trial. *See* Petitioner's Exhibit B-4.[5] This lengthy statement contains devastating impeachment material, and establishes beyond any doubt that Cook's trial testimony, rather than being the

[4] In his opening statement to the jury, then District Attorney Rafaelli told jurors "I think the testimony of Charles Cook is critical. . . ." 9 R 2129.

[5] Prosecutors revealed this statement to Mr. Banks for the first time during discovery in this proceeding and only after Magistrate Judge Malone ordered disclosure of those portions of the District Attorney's file that contained material concerning Charles Cook.

unrehearsed recalling of his April statement that he claimed to the jury, was a tightly crafted, repeatedly rehearsed event. (*See* Petitioner's Proposed Findings at pp.46-60 for a detailed discussion of this document's significance.) Moreover, it contains falsehoods known to the prosecution that the prosecutors let stand before the jury.[6]

8. Given the scope and breadth of impeachment material this suppressed statement contains, it is not possible to conclude that the statement was not "material" within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny. Tellingly, the Director has advanced no such argument. Indeed, the Director has not addressed the non-disclosure of this statement in its proposed findings before Magistrate Judge Malone, and thus has waived the opportunity to do so.

9. As Mr. Banks pointed out in his objections, the Magistrate Judge's Report never discusses or resolves the non-disclosure of this important statement. *See* Petitioner's Objections at pp. 23-24. Mr. Banks is entitled to the adjudication of this portion of this due process claim by this Court; its resolution will require the Court to grant relief as to Mr. Bank's conviction because its non-disclosure at trial rendered the guilt determination fundamentally unfair.

* * * *

[6] For example, Cook denied that he had spoken with District Attorney Raffaelli or any other law enforcement official about his testimony. This was surely false as Petitioner's Exhibit B-4 shows beyond doubt that he had spent a significant portion of the previous weekend practicing his testimony with members of the District Attorney and Sheriff Department staff. Thus, both the conclusion of the Magistrate Judge and this Court that the record contains no evidence of Cook committing perjury is erroneous.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CIVIL ACTION NO. 5:96-CV-353
JUDGE DAVID FOLSOM

DELMA BANKS, JR.,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

RESPONDENT JOHNSON'S RESPONSE TO PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR ORAL ARGUMENT WITH BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary L. Johnson, Director of the Texas Department of Criminal Justice's Institutional Division ("the Director"), by and through the Attorney General of Texas, and files this his Response to Petitioner's Motion to Alter and Amend Judgment and Motion for Oral Argument with Brief in Support. In support thereof, the Director would respectfully show this Court the following:

I.

PROCEDURAL BACKGROUND

The instant case involves a writ of habeas corpus petition brought by Texas death row inmate Delma Banks, Jr. ("Banks"). On May 11, 2000, Magistrate Judge Malone issued a report and recommendation that Banks' writ petition be conditionally granted due to errors impacting the

sentencing hearing. Exhibit "A" at DE[1] 141. Both the Director and Banks filed

* * * *

A. This Court Should Not Alter or Amend its Judgment Based on Banks' *Brady*[2] *Allegations.*

Banks argues that the prosecution possessed two pretrial statements from State's witness Charles Cook—one taken in Dallas in April, 1980 (Banks' Exhibit B-2), and the other taken in Texarkana in September, 1980 (Banks' Exhibit B-4) immediately before Banks' trial. Motion at 3 (referencing Banks' June 1999 evidentiary hearing exhibits). According to Banks, the State only disclosed the April 1980 statement to the defense, but did not provide "the much more detailed statement that Cook gave during the weekend prior to trial." *Id.* Banks argues that the Magistrate Judge's Report "never discusses or resolves the non-disclosure of this important statement." *Id.* at 4. He then asks the Court to resolve the issue and grant relief on Banks' conviction because the non-disclosure at trial "rendered the guilt determination fundamentally unfair." *Id.* This Court is not required to alter or amend its judgment based on Banks' pleadings.

1. *Banks' Brady allegations are not properly before the Court.*

First, Banks argues that Cook's September 1980 statement was revealed "for the first time during discovery in this [federal habeas] proceeding and only after Magistrate Judge Malone ordered disclosure of those portions of the District Attorney's file that contained material concerning Charles Cook."Motion at 3 n. 3.[3] Since Banks did not receive Cook's

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[1] "DE" refers to this Court's computer docket followed by the specific entry number.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[3] Magistrate Judge Malone's March 4, 1999, scheduling order required

statement until April 15, 1999 the prosecution's failure to disclose this statement was never raised as a claim in Banks' original federal writ petition because the petition had been filed over three years earlier on March 7, 1996. Exhibit "A" at DE 1 ("3/7/96—Original Complaint filed"). Once Banks became aware of the factual basis for his Brady claim, he should then have sought leave of Court to supplement or amend his federal writ petition to include the new claim. *See* 28 U.S.C. § 2242 ("[The application for writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."); FED. R. CIV. P. 15(a) & (d) (governing amended and supplemental pleadings); Rule 11, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, 28 U.S.C. § 2254 ("The Federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.")

Here, the Court docket does not evidence any attempt by Banks to supplement or amend his writ petition. Exhibit "A" (see all entries subsequent to Banks obtaining Cook's statement during discovery on April 15, 1999). Instead Banks argued the new claim for the first time in his proposed findings and conclusions, and in his objections to the Magistrate Judge's report. Motion at 2 & n. 3.[4] Such action is

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that (6) Respondent shall provide Petitioner with the following material on or before **April 15,1999**:

> b. That portion of the Bowie County District Attorney's file regarding the underlying criminal trial which relates to Charles Cook, Robert Farr, Carol Cook, and Vetrano Jefferson including but not limited to records of contact with the foregoing, preparation notes, interview notes, and all other written or recorded documentation.

Exhibit "A" at DE 74; Exhibit "B," copy of the Court order (original emphasis).

[4] Banks states that "he will reference earlier pleadings which set forth in more detail the merits of the claims discussed below," and he points the Court to his Proposed Findings of Fact and Conclusions of Law filed

wholly insufficient to present the claim to this Court. The Fifth Circuit has held that issues first argued by way of objections to the magistrate judge's findings, conclusions, and recommendations are not considered to be properly before the district court. *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); *see also United States v. Colon-Padilla*, 770 F.2d 1328, 1334 n. 6 (5th Cir. 1985). When the government has already filed a responsive pleading, as in the instant case, then Banks was required to seek leave of court to amend his pleadings. *Armstrong, supra; see also Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983) (Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend his pleadings once as a matter of course at any time before a responsive pleading is served). Because Banks did not raise his instant allegations in a federal writ claim, the Magistrate Judge did not err in not discussing this specific non-disclosure argument, and the Court is not required to alter or amend its judgment.

Furthermore, Banks' argument that the Director waived his opportunity to address the nondisclosure issue because he failed to argue it in his own proposed findings is meritless. *See* Motion at 4. Proposed findings of fact and conclusions of law are based on the claims raised in the writ petition, as well as on any supplemental or amended writ petition claims—not on allegations raised in the opposing side's proposed findings. For the Director to have argued claims raised for the first time in Banks' proposed findings would have required the Director to be psychic[5] because the Court ordered that

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March 7, 2000, and his Objections to the Findings, Conclusions and Recommendations Contained in Magistrate Judge's Report filed May 30, 2000. Motion at 2 & n.3. However, he never cites to an amended or supplemental writ petition which raises his instant claim.

[5] While Banks did question several witnesses at the June 1999 federal evidentiary hearing regarding Cook's undisclosed September 1980 statement, that action is insufficient to substitute for Banks' failure to amend or supplement his federal writ petition.

both sides submit their proposed findings simultaneously. *See, e.g.*, DE 126 ("The parties shall submit proposed Findings of Fact and Conclusions of Law on or before 12/17/99"). Thus because Banks' allegations concerning Cook's undisclosed September 1980 statement were never properly raised as a claim before the Court, neither the Director nor the Court were ever required to address the issue. Consequently, this Court is not required to alter or amend its judgment.

2. *Even if Banks' allegations were properly before the Court, he is not entitled to relief.*

Even if Banks had properly presented his claim of non-disclosure to this Court, then he would still not be entitled to habeas relief. According to Banks, Cook's undisclosed September 1980 statement "contains devastating impeachment material" and establishes that Cook's trial testimony was not an unrehearsed recalling of his April 1980 statement but instead "was a tightly crafted, repeatedly rehearsed event." Motion at 3-4. Banks also states that "it contains falsehoods known to the prosecution that the prosecutors let stand before the jury." *Id.* at 4.[6] These arguments do not entitled Banks to relief.

First, Banks fails to explain what allegedly "devastating impeachment material" the undisclosed statement contains. *See* Motion at 3-4. At best, he provides only one example

[6] Banks' statement that "it contains falsehoods" is somewhat confusing. In the context of his argument, the "it" refers to Cook's September 1980 statement which was not disclosed to the defense. *See* Motion at 3-4. However, since the statement was not disclosed and, therefore, was never presented to the jury, no falsehood was allowed to stand before the jury. Instead, Banks' argument appears to be that Cook was allowed to testify before the jury, and that his testimony—*not the statement*—contained falsehoods which were not corrected by the prosecution. *See* Motion at 4 n. 6.

where Cook's trial testimony differed from his September 1980 statement:

> For example, Cook denied that he had spoken with District Attorney Raffaelli or any other law enforcement official about his testimony. This was surely false as [Banks'] Exhibit B-4 [Cook's September 1980 statement] shows beyond doubt that he had spent a significant portion of the previous weekend practicing his testimony with members of the District Attorneys and Sheriff Department staff.

Id. at 4 n. 6. However, Banks did not need Cook's September 1980 statement in order to impeach him on this matter. Prior to cross-examining Cook at Banks' trial, defense counsel obtained Cook's April 1980 statement which was also made to police. 8 SR [7] 2143 (renumbered as 9 SR 2312); Exhibit "C," testimony excerpts at 1. Thus if Banks wanted to impeach Cook by proving that Cook had, in fact, spoken with law enforcement personnel prior to testifying, then Banks was clearly able to do so with the April 1980 witness statement he received prior to cross-examining Cook. In addition, it is apparent from defense counsel's questioning of Cook that he was aware the witness had spoken with police because counsel questioned Cook at length about his allegedly testifying in exchange for a deal on pending criminal charges. Exhibit "C" at 3-13. Banks' argument that counsel was unable to impeach Cook as a direct result of not having Cook's September 1980 statement is wholly without merit and does not warrant the Court granting habeas relief.

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[7] "SR" refers to the state court record of transcribed trial proceedings, preceded by volume number and followed by page reference.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

REPLY TO DIRECTOR'S RULE 59 RESPONSE

DELMA BANKS, JR., by and through undersigned counsel, respectfully files this reply to the Director's response to our Motion to Alter or Amend Judgment and Motion for Oral Argument.

Introduction

The Director's response to Mr. Banks' Rule 59 Motion to Alter or Amend Judgment and Motion for Oral Argument evinces a misunderstanding of the record as well as of prevailing law. With regard to the suppression of key state witness Charles Cook's lengthy pretrial statement, he mistakenly charges that Mr. Banks has never asserted such a claim. He further argues that the law favors denial of Mr. Bank's jury discrimination claim on technical grounds. These grounds are not sufficiently weighty enough to foreclose meritorious review of this important race claim. Mr. Banks thus files this short response to demonstrate that the Director is wrong and that he is entitled to relief on each ground.

ARGUMENT

I. *The Due Process-Suppression of Impeachment of Evidence Claim*

A. The Director's Argument that the Cook Impeachment Claim Is New Is Wrong and Completely Ignores the Record

1. The Director seeks to excuse his failure to address Mr. Banks' due process claim regarding suppression of impeachment material on two grounds. First, he contends that Mr. Banks never asserted such a claim. This contention, as we demonstrate below, is patently false. Second, the Director suggests that Mr. Banks' failure to amend his petition precludes consideration of this due process claim. The record demonstrates that this claim was pleaded, argued and briefed on its merits. As Mr. Banks will show, only one still familiarizing one's self with the extensive record in this case could reasonably advance these arguments.[1] The suppression of impeachment material concerning Mr. Cook was advanced at the inception of this case, was a paramount issue at the evidentiary hearing, and received significant attention in Mr. Banks' post-hearing submissions.

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[1] The Director is now represented by his fourth counsel in this matter. Throughout state post-conviction proceedings, the Director was represented by Assistant District Attorney James Elliott. From 1996 through the fall of 1998, the Director was represented in these proceedings by former Assistant Attorney General Meredith Matrinez. From the fall of 1998 until August of 1999, the Director was represented by former Assistant Attorney General Delane T. Hendrix. Just prior to the June, 1999 evidentiary hearing and continuing through August 2000, the Director was represented by former Assistant Attorney General Ann Kraatz. Since mid-August, 1999, the Director has been represented by Assistant Attorney General Katherine D. Hayes.

a. *This Claim* ***Was*** *Pleaded in the Petition*

2. The Director asserts that Mr. Banks did not plead a claim of suppression of impeachment material concerning Mr. Cook in his petition. The Director is mistaken. On page 46 of the petition, Mr. Banks alleged, as one of several due process violations committed by trial prosecutors, that the prosecutors "knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*." In this very paragraph, Mr. Banks specifically refers to key state witnesses Charles Cook and Robert Farr.[2]

b. *The Director's Prior Counsel Recognized Mr. Banks Pleaded a Due Process Suppression of Impeachment Evidence Claim*

3. Former counsel for the Director plainly understood that Mr. Banks was asserting a claim that the state had withheld *Brady* material concerning both Cook and Farr. In its Answer, under the heading "The State did not suppress favorable, material evidence," the Director acknowledged that *Brady* imposed "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," [and that] "such favorable evidence includes impeachment evidence." Answer at 108-109. More specifically, former counsel understood precisely that Mr. Banks was alleging that the state suppressed at trial material impeachment evidence concerning Charles Cook. That attorney wrote: "Banks contends that the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.*, at 111.

4. Importantly, the Director has not heretofore complained that he could not ascertain what Mr. Banks was alleging in his petition, nor did he request that the Court direct Mr. Banks to

[2] Mr. Banks cannot be faulted for not providing more detail. He pleaded all that he knew and provided the Director with sufficient notice of this constitutional claim.

be more specific. He understood that Mr. Banks was alleging, *inter alia*, that trial prosecutors had withheld impeachment material concerning Charles Cook.

5. Further, the Director did not assert that he had reviewed the files of the District Attorney nor could he assure the Court that no such material was contained therein. Instead, he took the position that this claim should be rejected because Mr. Banks could not prove the merit of the claim. Thus, the Director's position was that he understood Mr. Banks was pleading a claim that the trial prosecutor had suppressed, *inter alia*, impeachment material concerning Charles Cook, but that it lacked merit because of a lack of proof.

c. *Mr. Banks' Investigation Confirmed a Good Faith Basis to Believe Trial Prosecutors Suppressed impeachment Evidence Concerning Witnesses Cook and Farr*

6. Thereafter, Mr. Banks continued efforts, begun in state court, to establish the merit of this claim.[3] He moved the Court for investigative funds so that he could, *inter alia*, locate and interview Charles Cook and Robert Farr. He also moved for discovery of any document in the state's possession that would confirm the truth of the claim.

7. The investigation of this claim generated considerable evidence in support of Mr. Banks' claim that the state had indeed withheld exculpatory and impeachment evidence concerning both Charles Cook and Robert Farr. In February, 1999, Mr. Banks filed declarations from both state witnesses. *See* Reply to Court's Order of January 21, 1999. In each declaration, prosecution witnesses Cook and Farr provided specific evidence suggesting that the state had indeed

[3] Mr. Banks had been unable to locate Farr while proceedings were pending in state court. A volunteer investigator located and interviewed Cook in January, 1992, but Cook refused to speak with Mr. Banks' representatives thereafter.

suppressed evidence regarding both witnesses that *Brady* undoubtably would require to be disclosed at trial. For example, Cook's declaration said, *inter alia*, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. *Id.*, at Exh. #1 at 4-6. In his declaration, Robert Farr confirmed that he had served as a paid informant in the investigation of this case. *Id.*, at Exh. #2 at 2. The prosecution suppressed both of these crucial pieces of material evidence prior to and during Mr. Banks' trial.

d. *Magistrate Judge Malone Orders Limited Discovery After Concluding Impeachment Evidence Might Have Been Suppressed*

8. Largely because of this proffered evidence, Magistrate Judge Malone granted Mr. Banks limited discovery and ordered the production of records in the possession of the state that concerned, *inter alia*, interview notes, and all other written documentation concerning Charles Cook. *See* March 4, 199 Order at 2.

e. *The District Attorney's Office Discloses For First Time Impeachment Material Concerning Witness Cook*

9. In compliance with this discovery order, the Director disclosed, for the first time, portions of the District Attorney's file. One lengthy document contained therein was a 74-page transcript of a pretrial interview between law enforcement officials and Charles Cook.[4] By any measure, this document contains significant impeachment material.[5] This document,

[4] On major theme that runs through the entire interview is the interviewing prosecutor's disbelief concerning numerous assertions Cook made to police in his initial April, 1980, statement.

[5] Mr. Banks discussed in detail the significance of this statement in his Proposed Findings of Fact and Conclusions of Law at pp. 46-60. He incorporates that discussion herein.

later marked and introduced at the evidentiary hearing as Petitioner's Exhibit B-04, became one important piece of *evidence* to establish his *claim* that trial prosecutors deprived Mr. Banks of due process of law by suppressing important impeachment material concerning the state's key trial witness.

f. *The Court and Parties Acknowledge that One Issue to be Tried at the Evidentiary Hearing is the Suppression of Impeachment Material Concerning Charles Cook*

10. After these disclosures, and well in advance of the scheduled evidentiary hearing, Magistrate Judge Malone issued an order establishing the issues to which she would allow the parties to submit evidence. Magistrate Judge Malone understood Mr. Banks wanted to present evidence on three issues, the first one being "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr." March 5, 1999 Order at 1, 2. The Order restated the Director's position on this issue: no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." *Id.*, at 1. Importantly, the Director made no objection of surprise, no assertion that Mr. Banks had expanded his due process claim, nor any claim that portion of the issues articulated by the Magistrate Judge Malone were unexhausted.

11. Thereafter, the Director provided notice that he would utilize this very exhibit to defend again the due process claim. *See* Respondent Johnson's Witness and Exhibit List, filed April 30, 1999 at 2 ("to defend against the due process claim, the Director will submit as Petitioner's (sic) Exhibit 1, a copy of the entire investigative file of the Bowie County District Attorney's Office in the Banks case"), and indicated further

that he would call Assistant DA Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." The Cook statement was included in this file. Similarly, Banks made it very clear that he would use the Cook pretrial statement—Exhibit B-4—to establish his due process claim. *See* Petitioner's List of Exhibits at p. 2.

g. The Issue of Whether Trial Prosecutors Suppressed Material Impeachment Evidence Concerning Charles Cook is Tried at the Evidentiary Hearing

12. At the evidentiary hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook and Farr took center stage. Counsel for Banks made an opening statement in which he confirmed that he would prove, *inter alia*, that the trial prosecutors had unconstitutionally withheld impeachment evidence with regard to both Charles Cook and Robert Farr. *See* FH at 8. Moreover, counsel for Mr. Banks examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material. FH 25-27. When counsel examined Elliott about Cook's September statement, Elliott confirmed that the document had *not* been disclosed at trial, Ex. B-04. FH 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the exhibit that showed a staff prosecutor coaching Cook how to answer questions concerning his earlier April statement which, in the interviewer's view, made little sense. FH 64-68. On further redirect, Elliott was asked still more questions about inconsistencies between Cook's trial testimony and statements in Ex. B-04. FH 72-74. During the hearing, Mr. Banks moved this exhibit into evidence with no objection from the Director. FH 75.

13. Given the undisputed facts that (1) Mr. Banks actually pleaded a due process claim of suppression of *Brady* impeachment material in his petition, (2) the Director made clear in its first responsive pleading that he understood the

claim to include suppression of impeachment material concerning Mr. Cook, (3) the discovery process forced the District Attorney's Office to reveal for the first time Cook's extensive eve-of-trial statement, (4) the Magistrate Judge and parties agreed that one issue to be litigated at the evidentiary hearing was whether the trial prosecutor's withheld material impeachment evidence, (5) the pretrial statement, Petitioner's Exhibit B-04 was introduced and admitted without objection as evidence relevant to the claims at issue, and (6) state witnesses were extensively questioned about both the circumstances of the taking of this statement and its tardy disclosure, it is simply incredible for the Director to now assert that he had no idea that Mr. Banks was advancing a suppression of impeachment material claim concerning Mr. Cook. Considering this extensive record, it is also remarkable to assert that Mr. Banks was required to amend this claim into his petition after the statement was disclosed in the spring of 1999 in order to obtain review on the merits.

14. While Mr. Banks can only speculate why the Director failed to brief this issue in his post-hearing Proposed Findings, it might well be because that brief was prepared by an attorney who entered the case just prior to the evidentiary hearing, and who had to seek at least three enlargements of time to allow her to become familiar enough with the record to file that submission.

15. On the other hand, it is understandable how this issue evaded Magistrate Judge Malone's attention. This is only one of many cases Magistrate Judge Malone had before her for resolution. This case has an extensive record and presents more than a dozen claims. Few are straightforward and most require attention to collateral issues. Both parties filed Proposed Findings in excess of 100 pages. It is for this reason that Mr. Banks moved for oral argument so that the Magistrate Judge would have the opportunity to thoroughly explore the complexity of each issue with counsel prior to entry of judgment.

B. The Director's Laconic Argument That the Claim Is Meritless Ignores Many Arguments that Demonstrate Its Suppression Violated Due Process

16. Instead of explaining why the content of the suppressed document, Exhibit B-04 would have been of little use in impeaching Cook, the Director faults Mr. Banks for not setting forth his prejudice argument *in the Rule 59 motion*. There is a very good reason why Mr. Banks did not make the argument therein; he presented a detailed discussion of how the state's suppression of this document at trial was highly prejudicial in his Proposed Findings at pp 46-60, and explained in the motion that we was relying upon that pleading to keep the motion short and to the point.

17. The Director's hollow failure to explain the supposed lack of merit in Mr. Banks' suppression claim with respect to Exhibit B-04 points to a conclusion that the Director has no argument that will successfully refute the merits of the claim.

18. In his Proposed Findings, Mr. Banks' explained how the non-disclosure of Exhibit B-04 was clearly prejudicial. That argument remains unrebutted. He is plainly entitled to relief on this claim.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed _____]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

ORDER ON PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT AND MOTION FOR ORAL ARGUMENT

Before the Court is Petitioner Banks' Federal Rule of Civil Procedure 59(e) Motion to Alter or Amend the Judgment of this Court entered August 18, 2000, in the above referenced cause, and Motion for Oral Argument (doc. #151). The Court previously adopted the Magistrate Judge's Report and Recommendation conditionally granting Banks' writ of *habeas corpus* due to errors effecting the outcome of the sentencing phase of Banks' trial (doc. #149).

Banks asserts two challenges to the Court's Judgment in his Motion to Alter or Amend. First, Banks contends that this Court did not resolve the issue of whether Banks' due process rights were violated by the prosecution's failure to disclose to the defense State witness Charles Cook's September 1980, eve-of-trial interview with law enforcement officials.[1] Banks

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[1] Cook gave two pre-trial statements to law enforcement officials, one in April, 1980, and the other in September, 1980.

claims that the interview contains impeachment material, offering by way of example the fact that Cook's statement contradicts his testimony that he had spoken with the District Attorney or any other law enforcement official about his testimony.

The Court did not address Banks' claim because it was not raised in his federal writ of *habeas corpus*. Banks' federal writ alleged that the prosecution "knowingly failed to turn over exculpatory evidence" concerning several State witnesses, including Cook. On March 4, 1999, Magistrate Judge Caroline Craven [2] entered an order requiring Respondent to provide Banks with the "portion of the Bowie County District Attorney's file regarding the underlying criminal trial which relates to Charles Cook, . . . including but not limited to records of contact with the foregoing, preparation notes, interview notes, and all other written or recorded documentation" by April 15, 1999. Pursuant to that order, the prosecution turned over, for the first time, Cook's September 1980 interview. Thereafter, Magistrate Judge Craven conducted a hearing on Banks' claims of alleged *Brady* violations.[3]

While Banks' *Brady* claim in his federal writ alleged that the prosecution "knowingly failed to turn over exculpatory evidence," Banks' specific complaint concerning the September 1980 statement was not part of his original federal writ. As Banks states in his motion, the prosecution revealed the September 1980 statement to the defense for the first time after Magistrate Judge Craven ordered disclosure of the District Attorney's file. Motion at p. 3 n.5. Banks' federal writ was filed in 1996, three years before he was aware of the

[2] For clarification purposes, the Court notes that between the Magistrate Judge's Report and Recommendation and the current motion, Magistrate Judge Malone changed her last name to Craven.

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

September 1980 statement. Rather than amend or supplement his writ to include this specific *Brady* violation, however, Banks raised this facet of his *Brady* claim for the first time in his Proposed Findings of Fact and Conclusions of Law, and again in his Objections to the Magistrate Judge's Report and Recommendation. *See* 28 U.S.C. § 2242; Fed.R.Civ.P. 15(a) & (d). Issues first argued by way of objections to a Magistrate Judge's finding and conclusions are not considered to be properly before the district court. *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992).[4] Accordingly, Banks' first ground upon which to amend or alter this Court's Judgment must fail.

Banks next contends that no adequate and independent state law ground forbids review of his *Swain* claim.[5] This Court found Banks' *Swain* claim procedurally barred as a result of his failure to object to the venire during trial. Banks claims that he advanced three arguments establishing cause and prejudice to overcome his procedural default, which the Court failed to address. Two of Banks' arguments, that the Respondent waived the default defense and that Banks' attorney had a conflict of interest in raising a *Swain* claim since it would implicate his practices as the former District Attorney, were indeed discussed in the Magistrate Judge's Report and Recommendation. Banks' third argument, that the United States Supreme Court's recent decision in *Saldano v. Texas*, ___ U.S. ___, 120 S.Ct. 2214 (2000), suggests a shift

[4] Further, Banks' argument that the Respondent recognized Banks' specific claim because he paraphrased Banks' complaint as one that "the State suppressed material impeachment evidence in connection with its witness Charles Cook" is meritless. Banks' federal writ alleged that the State failed to disclose, among other things, a deal between Cook and the State to dismiss pending arson charges filed against Cook. The Respondent's paraphrase of Banks' claim was most likely responding to this alleged *Brady* violation.

[5] *Swain v. Alabama*, 380 U.S. 202 (1965).

in state policy concerning the enforcement of procedural bars to claims of intentional racial discrimination raised by capital prisoners in federal court proceedings, is entirely without merit. Banks states that "[i]f there once was a firm rule against hearing defaulted race claims, there no longer is one." Unlike the instant case, *Saldano* concerned the State's punishment phase evidence that individuals of a particular race were more likely to pose a future danger. Moreover, the Texas Attorney General's confession of error in *Saldano* does not extend to a confession of error in the instant case or any other case. Banks' second ground to alter or amend must fail. It is therefore

ORDERED that Banks' Motion to Alter or Amend the Judgment is DENIED.

IT IS FURTHER ORDERED that Banks' Motion for Oral Argument is DENIED.

SIGNED this 20th day of December, 2000.

/s/ David Folsom
JUDGE DAVID FOLSOM
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

APPLICATION FOR CERTIFICATE ALLOWING APPEAL

Delma Banks, Jr., by and through undersigned counsel, and pursuant to 28 U.S.C. § 2253(c) and FRAP 22(b), respectfully requests an Order issuing a certificate of appealability so that he may pursue his cross-appeal to the United States Court of Appeals for the Fifth Circuit on some but not all of the claims that the Court found not to warrant relief. In support of this application, Mr. Banks states as follows:

1. This is a capital habeas corpus proceeding. In the Court's final order and judgment, the Court granted Mr. Banks relief from his capital sentence on two grounds: trial counsel's ineffective assistance and the prosecution's suppression of impeachment material concerning key penalty phase witness Robert Farr. The Director has filed a notice of appeal and will ask the Court of Appeals to review these rulings.

* * * *

D. Prosecutorial Misconduct [Claims F & I]

The Court granted Mr. Banks' penalty phase relief because of the prosecution's suppression of Robert Farr's status as a paid informant as well as its failure to correct Farr's misleading testimony before the jury. The Court rejected three other misconduct claims that Mr. Banks respectfully believes are meritorious and warrant relief.

1. *Non-Disclosure of Charles Cook's September, 1980 Statement*

The Court ruled that this claim was not properly before the Court because Mr. Banks failed to amend the claim into the petition after the statement was disclosed by the Bowie County District Attorney three months prior to the evidentiary hearing held in June, 1999. The Court relied upon FRCP 15(a) and (d). We believe that jurists of reason could legitimately debate the correctness of this determination for the following reasons.

We have already pointed out in our post-judgment papers that Mr. Banks did plead a *Brady v. Maryland* claim and that he asserted the prosecution withheld material concerning Charles Cook which it was required to disclose prior to trial. This allegation was sufficient under Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts to alert the Director to the nature and breadth of his claim. Indeed, the Director's counsel, in his answer, understood that Mr. Banks was pleading a claim that charged that the prosecution had withheld, *inter alia*, impeachment evidence that was material. Thus, jurists of reason could conclude that Mr. Banks sufficiently placed the Director on notice that his Brady claim rested in part upon the non-disclosure of impeachment material.

Even if that were not the case, FRCP 15(b) provides that "when issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all

respects as if they had been raised in the pleadings." This issue of the state's suppression of impeachment material concerning Charles Cook was "expressly tried" at the June, 1999 evidentiary hearing. In ruling prior to the hearing on which issues the parties would be permitted to submit evidence, the Magistrate Judge identified as one such issue: "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning . . . Charles Cook." March 5, 1999 Order at 1, 2. At the June, 1999 hearing, the September statement, Petitioner's Exhibit B-4, was introduced into evidence without objection and the trial prosecutor and other witnesses at the hearing were examined extensively as to its content, and whether it was disclosed pretrial, by both counsel for Mr. Banks and the Director.

Mr. Banks thus believes that jurists of reason could legitimately disagree with the Court's conclusion that this claim was not properly placed before the Court by Mr. Banks. Moreover, this suppressed exhibit contains devastating impeachment; given the central importance of Charles Cook's credibility to the state's guilt case against Mr. Banks, it is inconceivable its non-disclosure could be held to be non-material, or harmless.

2. *Suppression of Deal For Cook Testimony*

The record contains strong evidence from several *prosecution* witnesses which corroborates Charles Cook's hearing testimony that, in fact, he testified at trial pursuant to a deal in which his pending arson charge would be dropped if he provided the prosecution with favorable testimony

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Feb. 20, 2001]

No. 5:96cv35 3

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of
Criminal Justice Institutional Division,
Respondent.

ORDER

This matter comes before the Court on Petitioner Delma Banks, Jr. ("Banks") application for a certificate of appealability, filed on February 2, 2001. On August 18, 2000, the Court adopted the Magistrate Judge's Report and Recommendation conditionally granting Banks' petition for writ of *habeas corpus* if the State did not vacate Banks' death sentence and impose a sentence less than death, or order a new punishment hearing. On January 24, 2001, Banks filed a Notice of Cross-Appeal.[1] Under 28 U.S.C. § 2253, a petitioner may appeal from a final order denying his petition for writ of *habeas corpus* only if he has first been granted a certificate of appealability. To obtain a certificate of appealability, Banks must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(1)(A). Specifically, Banks must demonstrate "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented

[1] Respondent Johnson filed a Notice of Appeal January 11, 2001.

were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Banks asserts that he is entitled to a certificate of appealability on the following issues:

1) Ineffective assistance of counsel

2) Improper exclusion of jurors

3) *Swain v. Alabama* claim

4) Prosecutorial misconduct

5) Bias juror claim

6) Sufficiency of evidence regarding future dangerousness

Banks' first claim is that his counsel was ineffective at the guilt phase of his trial because counsel failed to investigate any of the evidence, or interview any of the witnesses, prior to trial. Banks asserts that any reasonable effort by defense counsel would have revealed "substantial credible evidence" that would have cast doubt upon the State's case. Specifically, Banks contends that counsel should have reviewed the autopsy report, consulted with a forensic pathologist, and interviewed Mike Fisher, the witness who testified he heard gunshots at approximately 4:00 am the morning of the murder. Had counsel pursued this evidence, he would have found it supported the opinion of Dr. Reddick, an expert in forensic pathology who testified at the evidentiary hearing, that the victim was actually shot when Banks was in Dallas. Further, Banks claims that if counsel had spoken to witnesses who saw Banks and the victim together, counsel would have learned that the victim's car, which Banks allegedly stole and drove to Dallas, had severe mechanical problems and likely could not have made it to Dallas.

There was evidence offered at trial from State's witnesses that the victim was killed at about 4:00 am the morning of the murder, as well as testimony from Dr. Reddick at the

evidentiary hearing that it was possible that the victim was killed at the time Fisher heard the gun shots. There was also evidence that Banks was seen in Dallas, driving the victim's car. Based on this evidence, the Court found that Banks had failed to satisfy either prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' first claim.

In his second claim, Banks alleges that prospective jurors Juanita Swainger and Amy Rogers, who voiced general opposition to the death penalty during *voir dire*, were improperly excluded from jury service. Banks contends that the trial court applied the wrong standard in excluding each juror, and as such, the presumption of correctness of the trial court's decision does not apply. Banks does not reveal what incorrect standard the trial court applied, nor explain the trial court's error.

This Court noted that the standard governing juror qualification in a capital case is whether the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Acknowledging that the trial court used this standard, and giving the court's findings a presumption of correctness, this Court then held that the exclusion of these jurors did not violate Banks' constitutional rights. Banks' has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' second claim.

Banks' third claim is that the prosecution improperly excluded prospective minority jurors in violation of *Swain v. Alabama*, 308 U.S. 202 (1965). Banks' counsel failed to

object to the composition of the jury panel at trial. This claim was first raised in Banks' initial state writ of *habeas corpus*, where it was addressed on the merits and denied. Banks asserted the claim again in his third state writ. In response, the State urged for the first time that it be denied because counsel had failed to lodge an objection at trial. Following an evidentiary-hearing on the claim, the state court found that no *Swain* claim was raised at trial and although defense counsel knew of the possibility of such a claim he chose not to raise it because he did not believe the prosecution's conduct gave rise to the claim.

This Court held Banks' claim was procedurally barred because the last state court to consider the claim based its denial of relief on a state procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This case, however, is not a true procedural default case, and indeed, raises a unique issue. The state court's decision in Banks' first writ addressed the merits of his claim, and denied the claim on the merits. The second time Banks raised this claim, in his third state writ, the state court denied the claim on the basis that Banks failed to object at trial, as well as on the merits. When the claim was raised in this Court, the Court focused on the state court's decision denying this claim on the grounds Banks failed to make a timely objection to the exclusion of minority jurors at trial.

It is not clear to the Court why Banks' claim was not dismissed for abuse of the writ when it was raised for the second time in his third state writ. If it had been dismissed, the Texas Court of Criminal Appeals would not have reached the issue of Banks' failure to object at trial, and this Court presumably would not have addressed that issue. As such in light of the fact that Banks had preserved the claim in his first state writ this Court's failure to address the merits of Banks' *Swain* claim would have been error, if the merits had not been addressed.

However, the Court did address the merits of Banks' *Swain* claim, albeit in the context of his ineffective assistance of counsel claim. While the Court's discussion on the merits was not explicit in its earlier opinion, the Court now makes such findings explicit. In § A 3 of the Magistrate Judge's Report, she discussed the trial courts findings that Banks' trial counsel was aware of the *Swain* case, and that based upon his observation of the newly elected district attorney's prosecution of a black defendant for the rape of a white victim, wherein the district attorney allowed two blacks to sit on the jury, counsel believed a *Swain* claim would be frivolous. The Magistrate Judge also set forth the trial court's findings on the Swain claim in § E of her Report. The evidence presented at the state trial court's hearing supports the court's conclusion that the jury selection process in Banks' trial was racially neutral.[2] Based on the foregoing, Banks' has not persuaded the Court that his claim that minority jurors were excluded is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' third claim.

Banks' fourth claim alleges three instances of prosecutorial misconduct: the prosecutor failed to disclose witness Charles Cook's September 1980 statement to police, the prosecutor suppressed information about a deal between Cook and police and the prosecutor made improper summation arguments. The Court did not address Banks' claim concerning the September 1980 statement because the claim was not raised in Banks' federal writ. Banks argues that he did in fact plead a *Brady v. Maryland*, 373 U.S. 83 (1963), claim concerning Cook's September 1980 statement to police. For support, Banks relies upon his belief that the Respondent's answer showed that it understood Banks' pleading, as well as the Magistrate

[2] Banks' other challenges to the Court's resolution of this claim are moot based on the Court's treatment of the claim on the merits.

Judge's identification of one of the issues to be addressed at the evidentiary hearing as "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning . . . Charles Cook." Banks' points to Fed.R.Civ.P. 15(b)'s provision that "when issues not raised in the pleadings are tried by express or implied consent of the parties they shall be treated . . . as if they had been raised in the pleadings."

As discussed below, Banks' federal writ did allege that the State failed to disclose a deal between Cook and the State to dismiss Cook's pending arson charges. The Respondent's answer to Banks' writ, which Banks claims shows that the Respondent had knowledge of the September 1980 statement claim, was most likely responding to Banks' claim concerning Cook's deal with police. The same can be said of the Magistrate Judge's identification of the issues at the evidentiary hearing. It is interesting to note that Banks filed his federal writ in 1996, three years before he was aware of the September 1980 statement. Banks has failed to persuade this Court that jurists of reason would debate that either of these two examples showed that he had raised the specific issue of the prosecutor's suppression of the September 1980 statement in his writ.

Banks next asserts that the "record contains strong evidence from several prosecution witnesses" which corroborates witness Cook's claim that he testified at trial pursuant to a deal in which his pending arson charge would be dropped if he testified against Banks. Banks has failed to identify any of the alleged prosecution witnesses who would support this claim, or to inform the Court what evidence these witnesses would provide. As a result, he does not persuade the Court that his claim that the State suppressed a deal between Cook and police is debatable among jurists of reason.

Finally, Banks asserts that the Court erred in denying relief on his claim of improper summation arguments on two grounds; first, that the claim was procedurally barred and second, that the prosecutor did not have a manifest intent to comment on Banks' silence.

Banks contends that his counsel was ineffective in failing to object to the prosecution vouching for witness Cook's credibility, and therefore, that he has shown "cause" for the default in not objecting at trial. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law. *Id.* The Court concluded that Banks failed to show that his attorney's conduct in not objecting to the prosecution's argument prejudiced him under *Strickland*, and therefore, that his attorney was not ineffective. Banks does not attempt to demonstrate that the Court's conclusion was incorrect.

Next, Banks argues that the Court did not apply the correct line of cases in reviewing the issue of the prosecutor's alleged comment on Bank's failure to testify. However, Banks does not explain why the case law that the Court relied upon was incorrect, nor does he cite cases that the Court should have reviewed. As such, Banks has not persuaded the Court that the foregoing issues are debatable among jurists of reason. The Court will deny Banks a certificate of appealability on his fourth claim.

Banks' fifth claim alleges that his death penalty was determined by jurors who improperly based their decision, in part, on extraneous religious factors. Banks contends that the Court denied relief on this claim after concluding that the state court's decision that juror Wanda Wyatt was not biased was entitled to a presumption of correctness, even thought the

state court's findings focused exclusively upon her views on race. Juror Wyatt testified at the state evidentiary hearing that she did what she had to do in this case based on the evidence, noting that the Bible says to obey the laws of the land. Based on this, as well as other testimony, the trial court found that juror Wyatt relied on the evidence in reaching her verdict. In reviewing the claim, this Court, as well as the trial court, addressed juror Wyatt's faith-based views. Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' fifth claim.

In his final claim, Banks challenges the sufficiency of the evidence concerning future dangerousness. This Court found that Banks' claim was barred under the procedural default rule because the state trial court rejected the claim as procedurally barred in Banks' third state writ. Much like the argument he makes in his third claim, Banks contends that the Court should have addressed the merits of his sufficiency claim because the state trial court addressed the merits of this claim in his first two state court writs. Assuming *arguendo* that Banks' representation of the procedural history of his state writ proceedings is correct, this Court should have addressed the merits of Banks' sufficiency claim.

Again, while not explicit, the Court did address the merits of Banks' sufficiency claim. The Court recited the Texas Court of Criminal Appeal's statement of the underlying facts of this case, facts which in and of themselves may be sufficient to support the jury's affirmative answer to the future dangerousness special issue. *See Bell v. Texas*, 938 S.W.2d. 35, 42 (Tex.Crim.App. 1997) (citing *Bell v. Texas*, 724 S.W.2d 780, 803-04 (Tex.Crim.App. 1986) (finding facts of the offense alone "indicate[d] a propensity, perhaps even an appetite, for violence")). The victim, a sixteen year old

boy, was shot three times, twice in the head and once in the upper back. One of the shots had been fired at a maximum distance of eighteen to twenty-four inches. Witness Cook testified that Banks told him that Banks "decided to kill the person for the hell of it and to take his automobile to Dallas." This evidence is constitutionally sufficient to support the jury's finding that there was a probability that Banks would pose a future danger. Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' sixth claim.

Having found that Banks has failed to demonstrate that any of the issues he raised are debatable among jurists of reason, IT IS HEREBY ORDERED that a certificate of appealability is DENIED on all of Banks' claims.

SIGNED this 16th day of February, 2001.

/s/ Judge David Folsom
JUDGE DAVID FOLSOM
United States District Court Judge

DECLARATION OF ROBERT LEE FARR

County of San Bernardino)
) **Declaration of Robert Lee Farr**
State of California)

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

2. I testified at the capital murder trial of Delma Banks, Jr. in Texarkana, Texas in September of 1980.

3. Both before and after Delma was arrested for killing Richard Whitehead, I worked as a police informant for the Bureau of Alcohol, Tobacco, and Firearms; the Texas Department of Public Safety; and the Texarkana, Texas police department. For several years, I supplied information to police officers to help them make cases against drug dealers, a doctor, and pharmacists in Texas and Oklahoma. The ATF agent I worked for was in Oklahoma. The Texas DPS officer I worked with was Dale Hampton in Texas. Sometimes the police agencies paid me money for my work. The police also would let me falsify prescriptions for drugs that I was addicted to without arresting me because of my work for them. Several of the police officers knew that I sold pills.

4. I did not know Richard Whitehead. The only thing I knew about his murder is what I saw in the news. It was a very high profile case and was reported on the TV and in the newspapers constantly.

5. About one week before Delma's arrest, Willie Huff, a police officer with the Bowie County Sheriff's

Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office and asked me to get into his car. While I sat in his car, Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

6. I assume Willie Huff came to me because I was married to Sharon Jefferson, Delma's girlfriend's sister and so I knew the same people Delma knew. Like a lot of other policemen in the Texarkana area, Willie knew that I used and sold pills with false prescriptions. I assumed that if I did not help him with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help Willie. I was afraid that if I didn't help him, I would be arrested.

7. Willie first asked me if I knew Delma and I said yes. Willie Huff asked me to help him find Delma's gun. I told Willie that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.

8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma

told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.

9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma's gun was in Dallas. I also told Willie that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow us. This was the third or fourth conversation I had with Willie.

10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove from the house, our car was pulled over by the police on the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.

11. While I was at the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

12. At some point before Delma's trial, the District Attorney's office asked me to come by to look at two guns that they had. Both the District Attorney Louis Raffaelli and Charlie were there. They asked me if I recognized either of the guns, and I told them that I did not.

13. Less than a year after my testimony at Delma's trial, I left Texarkana, Texas. During my years as a police informant, I had helped the police put a lot of people away on drug charges. I had been paid for my work. I left because the people I had helped the police put away found out that I was a police informant. I was afraid of them. Also, Dale Hampton told me that I should stop working for the police because my life might be in danger. Because of all this, I am afraid to return to Texarkana, Texas because I fear for my life.

I have read the above paragraphs, numbered one through thirteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on 11-4-96

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:
/s/ Tena Francis 11/04/96

County of San Bernardino)
)
State of California)

DECLARATION OF ROBERT LEE FARR

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in Rialto, California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

2. I testified at the capital murder trial of Delma Banks, Jr., in Texarkana, Texas in September of 1980.

3. Both before and after Delma was arrested for killing Richard Whitehead, I worked as a police informant for the Bureau of Alcohol, Tobacco, and Firearms; the Texas Department of Public Safety; and the Texarkana, Texas police department. For several years, I supplied information to police officers to help them make cases against drug dealers, a doctor, and pharmacists in Texas and Oklahoma. The AFT agent I worked for was in Oklahoma. The Texas DPS officer I worked for was Dale Hampton in Texas. Sometimes the police agencies paid me money for my work. The police also would let me falsify prescriptions for drugs that I was addicted to without arresting me because of my work for them. Several of the police officers knew that I sold pills.

4. I did not know Richard Whitehead. The only thing I knew about his murder is what I saw in the news. It was a very high profile case and was reported on the TV and in the newspapers constantly.

5. About one week before Delma's arrest Willie Huff, a police officer with the Bowie County Sheriff's

Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office and asked me to get into his car. While I sat in his car Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

6. I assume Willie Huff came to me because I was married to Sharon Jefferson, Delma's girlfriend's sister and so I knew the same people Delma knew. Like a lot of other policemen in the Texarkana area, Willie knew that I used and sold pills with false prescriptions. I assumed that if I did not help him with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help Willie. I was afraid that if I didn't help him, I would be arrested.

7. Willie first asked me if I knew Delma and I said yes. Willie Huff asked me to help him find Delma's gun. I told Willie that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.

8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma

told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.

9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow us. This was the third or fourth conversation I had with Willie.

10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove away from the house, our car was pulled over by the police on the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.

11. While I was in the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

12. At some point before Delma's trial, the District Attorney's office asked me to come by to look at two guns that they had. Both the District Attorney Louis Raffaelli and Charlie were there. They asked me if I recognized either of the guns, and I told them that I did not.

13. Less than a year after my testimony at Delma's trial, I left Texarkana, Texas. During my years as a police informant, I had helped the police put a lot of people away on drug charges. I had been paid for my work. I left because the people I had helped the police put away found out that I was a police informant. I was afraid of them. Dale Hampton told me that I should stop working for the police because my life might be in danger. Because of all this, I am afraid to return to Texarkana, Texas because I fear for my life

14. Finally, because of fear of revealing my former life as an informant, I agreed to speak with representatives of Delma Banks in 1996, and again in 1999, only reluctantly, and only after they made considerable effort to locate me. I would not have revealed the information in this declaration to them, or to anyone else, before I elected to do so in the fall of 1996.

I have read the above paragraphs, numbered one through fourteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on May 21, 1999

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:
/s/ Gail Greco
GAIL GRECO

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS COUNTY OF DALLAS

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Sue Walthall, a Notary Public in and for said County, State of Texas, on this day personally appeared CHARLES E. COOK

Who, after by being me duly sworn, on oath deposes and says: The real truth of my knowing:

I, Mr. Charles E. Cook, 1734 South Marsalis, here in Dallas, Texas 75216, hereby speak in print of the truth. On a Saturday morning two weeks, April 12, 1980, me and my future wife, Ms. Ida Marie Martin, was standing at the bus stop waiting for the bus around 8:00 a.m. or 8:30 a.m., when a fast Mustang drove up and stopped at the corner of 1734 South Marsalis. He, the man (Red) Delman Banks, ask me about a cheap motel to stay for a few days. He said he only had about $70.00 on him. So I told him to pull over and I would try to help him find a reasonable place for less money since he had little on him from out of town. (Red) Mr. Delman Banks I thought was a cool brother, and I ask him if he would take my wife to work since she was running late. So he (Delman Banks) said he would and I ran in the house and pulled off my robe and got dressed and got in the fast hot rod two-tone green mustang car and we took off to the Hyatt Regency downtown. We left the Hyatt Regency downtown and went back over to my house, 1734 South Marsalis and I introduced Delman Banks to my grandmother. She approved of him and I put him in some brown pants and a blue shirt, and we went riding to West Dallas to visit a few of my friends and my sister to see her little baby boy she had for Easter. After that we left and went riding to find (Red) Delman Banks a place to stay so that he could take a bath because he had blood on his right leg. I said (Red) what blood

on you for. He said he got in to it with a white boy coming to Dallas on the highway. I said what you do man, he said I shot him, I said did you kill him, he said hell yea, the bitch is dead. I kinda got afraid at his feeling come after he told me that. Later on we drunk beer and wine. I took Red to a motel on Lancaster to the left on a hill $5.00 for two hours. He told me to take his car and come back to get him, because he needed some rest and a bath. So I took off just riding around. I went and got my chickens something to eat and brought me three more baby chicks. Then I went back and got (Delman Banks) on Lancaster, but he was out like a light. So I left again just enjoying the fast car he had that I thought was his. I went back for the third time after leaving him there, he was still asleep but I woke him up because his time had run out on him. We left and got something to eat and riding about the streets.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Sue Walthall
SUE WALTHALL
Notary Public, Dallas County, Texas

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Sue Walthall, a Notary Public in and for said County, State of Texas, on this day personally appeared CHARLES E. COOK.

Who, after being by me duly sworn, on oath deposes and says:

just talking about different things of life, of him making it in Dallas, him and his wife in Texarkana. I told him I would try to help him all I could if he wanted to settle down. Okay that night (Saturday), I let Red spend the night with me at my grandmother's home, and then that's when I noticed Red had a pistol 25 with him in his jacket. (Red) was looking sad for some reason sitting on the bed in the other room. I sat down beside him and told him that something was wrong and that he could tell me the truth about his sadness. He looked at me with tears in his eyes and said man I have lied to you about the whole thing. I said tell me the truth right because I have been to prison two times already and I can't stand no kind of trouble at all. Red said man me and this white boy was in the woods in Texarkana drinking when I thought about killing him and taking his car to Dallas just for the hell of it. He said the white boy started to the car to get another beer when he (Delman Banks) shot him and kinda miss him across the head. He said the white boy turned around and said man what's happening. What's wrong, what did I do. Red said he shot him again and again, and the white boy fell, Delman Banks told me he got into his car and looked down at him and shot him again through the head to make sure the boy was dead. He said he then ran over the boy's legs in the two-tone green Mustang and headed for the Big D. I told Red to get down on his knees and pray and ask God to forgive him and go back on and turn his self in for his punishment. He said no

way I'll go back there and do that. I said okay but you can not stay here because I live with my people. That Sunday the 13th, 1980, we went over to different peoples homes, apartments for a place for Red to stay. He called his home and his mother told him the same thing. Turn his self in. So I went to work that Monday the 14th, 1980, and left (Red) alone in my grandmother's house without telling them the truth of Mr. Delman Banks. That Monday evening I put Red on the Greyhound Bus at 5:45 p.m. and I, Charles E. Cook left the bus station in the Mustang. The next morning around 6:00 a.m. I took the hot car and left it at the end of Canna Drive with the keys under the seat and I took Red's pistol and sold it to a friend across the street of Marsalis for $10.00 and the radio. Booster cables and small tool box for a total price of $15.00. And that's the truth of my nature of this young man Mr. Delman Banks.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Sue Walthall
SUE WALTHALL
Notary Public, Dallas County,

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Eileen J. Murray, a Notary Public in and for said County, State of Texas, on this day oersonally appeared Charles E. Cook

Who, after being by me duly sworn, on oath deposes and says:

I Charles E. Cook got the pistol 25 cal. AG Brand, Service #374172 back from Mr. Bennie Lee Jones, the day of April 24, 1980 at the time of 8:50 a.m with offers to the adrest of 1738 So. Marsalis, of the home of Mr. Jones. Mr Jones retune the pistol 25 AG. Bran back to me said of Charles E. Cook. The gun I sold to Mr. Jones is the same gun that Delman Banks gave to me (Charles E. Cook) as state it in the frist statement as sing. Time 8:50 a.m.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Eileen J. Murray
EILEEN J. MURRAY
Notary Public, Dallas County, Texas

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Sep. 23, 2002]

No. 01-40058

DELMA BANKS, JR.
Petitioner - Appellee-Cross-Appellant,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent - Appellant-Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Texas, Texarkana

---

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BARKSDALE, and DENNIS, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

United States Circuit Judge

FILED
JUL 11 2003
OFFICE OF THE CLERK

(10)

No. 02-8286

IN THE

Supreme Court of the United States

DELMA BANKS, JR.,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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July 11, 2003

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QUESTIONS PRESENTED

1. Did the Fifth Circuit commit legal error in rejecting Banks' *Brady* claim-that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial-on the grounds that:

(a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that, like in *Strickler v. Greene*, 527 U.S. 263 (1999), there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during the trial or state post-conviction proceedings; and

(b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate?

2. Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?

3. Did the Fifth Circuit act contrary to *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 507 U.S. 680 (1993) in holding that Fed. R. Civ. P. 15(b) does not apply to *habeas* proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Delma Banks, Jr. was the appellee, cross-appellant below. Janie Cockrell was the appellant, cross-appellee below.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. It is reprinted at Pet. App. A1-A78, and the Fifth Circuit's order denying rehearing is found at JA 450. The unreported decision of the United States District Court for the Eastern District of Texas is reprinted at Pet. App. B 1-B6.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 2002. A timely petition for rehearing was denied on September 23, 2002. The petition for writ of certiorari was filed on December 23, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which provide respectively that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. § 2253(c)(2), reprinted at Pet. App. J1; and Fed. Rule Civ. Pro. 15(b), "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

STATEMENT OF THE CASE

Delma Banks' conviction and death sentence were procured through the prosecution's deliberate presentation of false testimony and suppression of material impeachment evidence, together with devastating ineptitude by defense counsel. The Fifth Circuit below refused to rectify these

constitutional violations for reasons that cannot bear examination under this Court's precedents. What the record shows is this:

A. State Trial Court Proceedings

1. *The Crime*

On Monday, April 14, 1980, at roughly 10:00 a.m., the body of sixteen-year-old Richard Whitehead was found in a Bowie County, Texas park. 9R 2169.[1] He had been shot three times. Police learned that 21-year old Delma Banks, Jr. had been with Whitehead when Whitehead was last seen alive, on the evening of April 11. Banks, who had no prior record, was charged with Whitehead's murder after one Charles Cook told police that Banks had admitted the crime and given Cook the murder weapon.

2. *Trial Proceedings*

Trial began on September 29, 1980. 9R 208.1 The District Attorney told the jurors that the State's case depended heavily on Cook, a twice-convicted felon who was awaiting prosecution on habitual offender charges.[2]

The State had no eyewitnesses, no confession other than the purported one to Cook, and no evidence independent of Cook linking Banks to the murder.

Two witnesses, Patricia Hicks and Patricia Bungardt, both acquaintances of Whitehead, identified Banks as having been

---

[1] References to the Joint Appendix will be cited as JA and then the page number. References to the state trial record will appear as volume and page number, __ R __. References to the state post-conviction record will appear as volume and page, __ SH__. References to the federal habeas record will appear as volume and page, __ FH __.

[2] The prosecutor told jurors, "Charles Cook is a very important witness for two reasons. First, because Delma Banks admitted to Charles Cook that he killed Richard Whitehead and robbed him of his automobile. Second, because Delma Banks left the murder weapon and the stolen vehicle with Charles Cook." 9R 2128-29.

with Whitehead on the evening of April 11. 9R 2150, 2154. Hicks, a 14-year-old, testified that she, Whitehead and Banks spent part of the evening drinking beer at the park where Whitehead was later found. *Id.* at 2150. Bungardt testified that Banks and Whitehead visited her home between 11:00 and midnight. 9R 2155. Neither testified about any animosity between Banks and Whitehead.

Mike Fisher, who lived near the park, testified that he was awakened by two loud noises at roughly 4:00 a.m. on Saturday morning. *Id.* at 2158. Pathologist Vincent DiMaio testified that Whitehead died from three bullet wounds. *Id.* at 2390.

Bowie County Deputy Sheriff Willie Huff, the lead investigator, testified that he received a tip on April 23 that Banks would travel to Dallas that evening. He and other officers followed a car containing Banks, Robert Farr and Marcus Jefferson. Jefferson testified that after arriving in Dallas, Banks drove to a South Dallas house, went to the front door, and returned a short time later with a pistol. 9R 2265. Farr testified that Banks then said that this was not his pistol; his was with a "broad in West Dallas." *Id.* at 2254-61, 2267-69.[3]

Deputy Huff testified that after seeing the car stop at the South Dallas house and Banks return with an object in his hand, police stopped and searched the car. They found a .22 caliber pistol and shortly thereafter went to the house where Banks had been. The officers entered the house and confronted the occupant, Charles Cook. Later that morning, Cook went to a neighbor's house and returned with a .25 caliber pistol. Huff testified that he submitted this weapon for forensic testing for comparison against the bullets recovered from Whitehead. 9R 2208.

---

[3] On cross-examination, Farr admitted that he used illegal drugs, but denied that he was a paid informant. *Id.* at 2274. He also denied receiving any consideration for his testimony, and he swore that he had not spoken with law enforcement officials about the case. *Id.* at 2274, 2276-77.

Charles Cook, the prosecution's key guilt-phase witness, testified that Banks drove up in front of Cook's Dallas home at roughly 8:30 a.m. on Saturday, April 12 in a green Mustang, said he was unfamiliar with Dallas, and asked whether Cook would help him find a place to stay. 9R 2285-86. Cook agreed to aid Banks, and Banks stayed with Cook the following two days. *Id.* at 2293, 2299. Banks drove Cook's wife to work, and when they returned home, Cook noticed what he thought was blood on Banks' right leg. *Id.* at 2287-88. According to Cook, Banks told Cook that Banks "got into it on the highway with a white boy" and that Banks shot him. *Id.* at 2289.

Cook further testified that he then gave Banks fresh clothes and they visited Cook's sister who had a new baby. *Id.* at 2289-90. Cook next took Banks to a motel where Banks slept for a number of hours. *Id.* at 2290-91. Cook and Banks went out that evening. *Id.* at 2293. Cook showed Banks around Dallas. *Id.* They returned to Cook's house, and Cook told Banks to sleep in a room opposite his and his wife's. *Id.* at 2293-94. Cook testified that just before going to bed, he saw Banks sitting on the bed "with his head down." *Id.* at 2294. Cook testified that Banks then confessed that he had not been truthful with Cook; that Banks had driven around the night before with a "white boy and his girl friend"; and that Banks had shot the white boy "for the hell of it" and taken his car to drive to Dallas. *Id.* at 2295. Cook testified that he was afraid and told Banks that Cook could no longer allow him to stay in the house. Cook testified that, before retreating to his room, he noticed for the first time that Banks had a pistol. *Id.* at 2296, 2299.

Cook testified that the following day, he searched unsuccessfully for another place for Banks to stay. *Id.* at 2297-98. He also testified that Banks agreed to return home the next day and spent Sunday evening at Cook's home. Cook testified that before going to sleep, Cook persuaded Banks to let him hold the pistol for his family's safety. *Id.* at 2300.

Cook testified that on Monday both Cook and his wife worked all day and, when they returned home, drove Banks to the bus station where Banks caught the bus back to Texarkana. *Id.* at 2302. Cook testified that Banks left the car and gun with him. *Id.* at 2303-04. Cook testified that on the following day, he drove the car to Canada Drive in West Dallas and abandoned it. *Id.* at 2303. Cook testified that on Tuesday evening, he sold the pistol to a neighbor, Benny Lee Jones, for $10. *Id.* at 2305. Cook also testified that he sold Jones jumper cables and a tool box from the car. *Id.*

Cook testified that nearly two weeks later, police came to his house searching for Banks' pistol and Cook retrieved it for them. *Id.* at 2305-06. He testified that Banks called him to make sure that Cook had disposed of the car and that Banks requested that Cook mail him the pistol. *Id.* at 2307-08. He testified that the next time he saw Banks, Banks showed up at Cook's front door in the wee hours of the morning, again requesting return of his pistol, and that this was the same morning the police came in search of the gun. *Id.* at 2309-10.

On cross-examination, Cook denied that he had rehearsed his testimony with law enforcement officials or spoken to anyone about his testimony.[4] He acknowledged that an arson charge and habitual offender papers were pending against him in Dallas but denied any deal for his testimony. 9R 2323.

Firearms examiner Allen Jones testified summarily that the bullets recovered from Mr. Whitehead and the crime scene likely were fired from the .25 pistol Cook retrieved from Bennie Lee Jones. *Id.* at 2357-58. The firearms examiner did not describe how he arrived at this conclusion, nor was he

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[4] "Q. Who all have you talked to about this, Mr. Cook? A. I haven't talked to anyone about it. Q. Haven't talked to anyone? A. No sir. Q. Mr. Raffaelli just put you on the stand, not knowing what you were going to testify to. Is that what you're telling me? A. That's what I'm telling you." 9R 2314.

cross-examined about it. The State then rested its case. 1OR 2412. The defense rested without calling a witness.

The closing arguments of counsel focused upon the credibility of Robert Farr and Charles Cook. Prosecutor James Elliott asserted that Farr's candor in acknowledging his drug use showed that he was a truthful witness. 1OR 2449. Elliott told the jurors that "Charles Cook didn't hide anything from you either." *Id.* at 2450. He assured them that "Charles Cook brought you absolute truth," and that he and District Attorney Raffaelli "didn't hide anything with regard to any of these witnesses." *Id.* at 2450. Defense counsel Cooksey noted that Cook was the key witness and urged the jury to find that his testimony was not credible. *Id.* at 2465, 2471. The jury retired to deliberate at 7:55 p.m. and returned a guilty verdict at 11:08 p.m. *Id.* at 2485.

The penalty phase began the next morning.[5] The State's case for death and its submission that Banks would likely commit acts of violence in the future rested upon the testimony of two witnesses: Vetrano Jefferson and Robert Farr. Jefferson, Banks' common-law brother-in-law, testified that, without provocation, Banks struck him with a pistol and threatened to kill him one week prior to the Whitehead killing. *Id.* at 2493-94. Farr returned to the stand and testified that the reason Banks drove to Dallas on the evening of his arrest was so that Banks could reclaim his gun and commit armed robberies. *Id.* at 2500-02. Farr also testified that Banks said the gun would allow him to take care of any trouble that might arise during a robbery. *Id.*

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[5] This case was tried pursuant to the former Texas procedure that required the jury to make findings upon three special issues during the sentencing hearing. If the jury concluded unanimously and beyond a reasonable doubt that the defendant had deliberately killed the victim, that the victim had not provoked the crime, and that it was reasonably likely that the defendant would commit acts of violence in the future, the death penalty would be imposed. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

On cross-examination, Farr denied that he had contacted Deputy Huff on April 23 to alert Huff that Banks would be traveling to Dallas to obtain a weapon. 1OR 2503-04. Farr also denied that he was seeking to please the prosecution. *Id.* at 2505. Farr denied that he "got Delma to go" to Dallas, and Farr denied that he was carrying narcotics during the trip. *Id.*

The defense called several hastily assembled acquaintances of Banks and his parents. First, Mr. Banks, Sr. and then a number of adult acquaintances testified briefly that Delma, Jr., was a respectful, churchgoing young man and a hard worker. *Id.* at 2514-31. Two witnesses were called to discredit Farr. James Kelly testified that he had recently driven Farr to a number of doctors' offices to fill phoney prescriptions, *id.* at 2546-51; and former Arkansas police officer Gary Owen testified that Farr had served as a paid informant in that state and was known as unreliable. *Id.* at 2557-58. Banks testified and maintained his innocence. He pointedly contested Farr's account that he, rather than Farr himself, wanted a gun to commit robberies, and he denied owning a .25 caliber pistol. He assured jurors that he would live peacefully in prison if given a life sentence. *Id.* at 2566-69. Ellean Banks, Banks' mother, in very brief testimony, asked the jury to spare her son, whom she described as innocent and a good son. *Id.* at 2575-76.

In closing, the prosecutor argued that the evidence showed that Banks would be dangerous in the future. *Id.* at 2578-82. In urging the jury to find that the special issue of future dangerousness had been proven, he relied exclusively upon Farr's testimony,[6] who, he reminded jurors, "has been open

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[6] The prosecutor told jurors: "Take the testimony of Robert Farr. They went to Dallas to get the pistol. Delma Banks' pistol. Do harm? Robbery? Delma Banks said he was going to get the pistol to do armed robbery. . . . And you heard Robert Farr tell him, as he drove away, to load it, and that, `I'll take care of it.' I submit to you beyond a reasonable doubt that the State has again met its burden of proof, and that the answer to question two should also be yes." *Id.* at 2589-90.

and honest with you in every way." *Id.* at 2579. He urged the jurors to discount the defense "character" witnesses as not useful.

In a brief closing, defense counsel Cooksey argued that the evidence supporting the future dangerousness special issue was insufficient. *Id.* at 2590-95. He said that the State had failed to present expert testimony in support of danger ousness and that "the testimony they have that would involve Delma in any future acts of violence is the statement of Robert Farr." *Id.* at 2591. He urged the jury to be wary of Farr's testimony—" I plead with you, please examine Robert Farr's testimony." *Id.*

In rebuttal, the prosecutor reinforced the importance of Farr's testimony. He told jurors it was "of utmost significance." *Id.* at 2593. The jury found that the State's evidence established the statutory special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.[7]

B. Post-Conviction Proceedings

Thereafter, Banks sought post-conviction relief, first in the Texas state courts and then in the federal courts. On January 13, 1992, Banks filed a state habeas application and pleaded, *inter alia*, claims alleging prosecutorial misconduct that included the handling of State witnesses Farr and Cook and a claim of ineffective assistance of counsel at both the guilt and penalty phases of trial.[8] The state trial court recommended

[7] On direct review, the Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982), *cert. denied, Banks v. Texas*, 464 U.S. 904 (1983).

[8] Banks had filed two earlier petitions challenging his capital conviction and sentence. The first was filed on December 27, 1983 and denied by the Court of Criminal Appeals on February 29, 1984 in an unpublished order. *Ex parte Banks*, No. 13, 568-01. The second was filed on May 2, 1984 and denied in a published opinion. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). In those actions Banks did not raise the claims presented herein.

denial of these claims and never acted upon requests for discovery and an evidentiary hearing. The Court of Criminal Appeals accepted these recommendations and denied relief.[9]

Banks filed his application for federal habeas relief on March 7, 1996,[10] raising the same claims. As he had in state court, he moved for an evidentiary hearing and for limited discovery. 1FH 303, 2FH 527.

1. Farr Misrepresentation and Suppression Claim

Banks alleged that Farr was a paid informant, that he set up Banks' arrest, that these critical facts were known to the trial prosecutors, and that they suppressed them. Banks sought discovery and an evidentiary hearing on this claim. The Magistrate Judge initially denied discovery because Banks failed to make specific allegations as required by *Harris v. Nelson*, 394 U.S. 286 (1969). 2FH 586.

Thereafter, Banks supplemented his discovery requests with affidavits from five state witnesses. Each asserted that significant portions of their trial testimony against Banks were misleading or false, and that they had testified falsely under pressure from law enforcement officials. 2FH 598-619. Robert Farr and Charles Cook both recanted important aspects of their trial testimony and described their previously undisclosed involvement with law enforcement prior to trial. Vetrano Jefferson disavowed his penalty-phase testimony insofar as it accused Banks of being the aggressor in the early April, 1980 fight. JA 337. Carol Cook, Charles Cook's sister,

[9] The procedural history of these proceedings is both complex and crucial to the resolution of the issues before this Court. To promote clarity, we will discuss that history in the Argument section relating to each claim.

[10] This case is governed by pre-AEDPA standards except for 28 U.S.C. § 2253, relating to certificates of appealability. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Slack v. McDaniel*, 529 U.S. 473 (2000).

stated that Deputy Huff told her to testify that the car in which she saw Banks and her brother riding was green, though the one she saw was actually red. JA 333. Marcus Jefferson, the person who had driven to Dallas with Banks and Robert Farr, stated that it was Farr's idea, not Banks' idea, to go to Dallas to obtain a gun. JA 334.

On the basis of these proffers, Banks again moved for discovery concerning impeachment material, and for an evidentiary hearing. 2FH 618. The proffers led the Magistrate Judge to reconsider and order disclosure of files in the State's possession relating to these witnesses. The Magistrate Judge thereafter ordered an evidentiary hearing. 3FH 625-31.

At the hearing Banks presented evidence that proved beyond doubt that Farr had served as a paid informant during the investigation which led to charging Banks with Whitehead's murder; that that status was known to the prosecutors; *and* that key portions of Farr's trial testimony were inaccurate and misleading. Farr, who was then residing in California, testified by declaration that in 1980 he was an informant for several law enforcement agencies, including those in Texarkana, and that Deputy Huff requested his assistance in Banks' case. Farr agreed to help because he believed that if he refused, Huff would arrest him on drug charges. Farr demanded money and Huff agreed to and did pay him $200. Farr testified that he then went to work to "set Delma up."

> I told Delma that I wanted to rob a pharmacy to get drugs but that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery.

JA at 438.

Farr thereafter apprized Deputy Huff when Farr, Banks and Marcus Jefferson drove to Dallas. After Banks was

arrested, Farr was free to leave even though he had been carrying drugs. He also received an additional $25 from another law enforcement officer working on this case. JA 439.

Trial prosecutor Elliott testified, and confirmed that Farr had served as an informant in this case. Huff testified that he had personally recruited Farr and paid him $200. 6FH 54-55; 6FH 89. Neither Elliott nor Huff disputed the substance of Farr's declaration nor claimed that Farr's informant status had been disclosed to defense counsel previously.

2. The Ineffective Assistance of Counsel Claim

Banks pleaded ineffective assistance at both phases of trial. Because the state court held no hearing on this claim and made no findings, the Magistrate Judge ordered a limited hearing. 1FH 32-33; 1SH 88-115.

At the federal hearing, Banks presented the following evidence, which was consistent with the evidence he had proffered in the state courts. Two psychologists, Gregorio Pina and Mark Cunningham, found that Banks was beset with a chronic, uncontrollable skin disorder that led to unending pain, disfigurement, and irreparable damage to his sense of self-worth. "From Mr. Banks' birth, he has suffered from a severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin. . . . As a result of his condition, Mr. Banks suffered from chronic raw and bleeding skin and hives . . . ." JA 207. Throughout his developmental years, he often displayed this acute, disfiguring skin condition. "This is not a subtle rash. We're talking about weeping, oozing, bleeding lesions and sores and cracks in the skin." JA 355. These sores drew such disgust and degradation from his peers that Banks grew socially, as well as physically, deformed, and came to view himself as grotesque. "He was ridiculed by peers who responded to these open, oozing sores with teasing and disgust. . . ." JA 355. "[These sores] also had *catastrophic* consequences for Mr. Banks' emotional and psychological

development. Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore. . . ." JA 208 (emphasis in original).

The evidence documented other handicaps to Banks' development as well: he functions as borderline mentally retarded, has significant short term memory and communication deficits, and shows indications of organic brain impairment. *See* JA 205-206, 353-54.

In addition, Banks was the target of his alcoholic father's repeated acts of abuse and physical trauma. "It was a climate of physical abuse and emotional terrorization that was directed toward Delma Banks by his father. . . . [He] was beaten with a belt, strap, horse whip, extension cord, coat hanger." JA 351-52. On numerous occasions, from the time that he was an infant through his developmental years, he had to flee the home with his mother and siblings to escape his father's drunken rage. On other occasions, he was "beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped," JA 207, "and then left with statements of how the wild animals were going to find him and begin to chew on him during the night." JA 352.

Mr. Banks' full psychological evaluation revealed that he was not likely to engage in future acts of violence in the structured setting of prison. "[S]ome of these features of Mr. Banks' psychological profile accurately would have predicted that he would prove a 'safe,' nonviolent inmate during his present incarceration. . . . He is best described as a docile, obedient, and subservient person who is eager to please even those who incarcerate him." JA 210-11. "The prison system provides a significant degree of external structure to help insulate and support the damages that have occurred to somebody up to that time. . . . [I]n the frame work of prison with work and confinement and structure and treatment and staff, it helps block and insulate much of the adverse

expressions and damage that might have otherwise been done." JA 358.

At the hearing, Vetrano Jefferson admitted that his trial testimony had been false and that he, not Banks, was the aggressor during their fight. "I was drunk that day . . . and I was threatening my sister and he defended her. . . ." 6FH 166. When asked who started the fight, Jefferson stated "I did." *Id.* He also testified that he never spoke to defense counsel prior to trial and that he would have been willing to do so if they had asked to speak with him about the incident. *Id.* at 168.[11]

Banks' mother testified that trial counsel demanded a fee of $10,000 but the family could pay only $1,000. 6FH 221. She recounted that "[h]e never did tell me anything that I was supposed to say or [that] he was going to ask me or what's going to happen." *Id.* at 227. This echoed her proffered evidence in state court that "I had no idea what Mr. Cooksey was going to ask me or what exactly I could say to help Delma Jr. . . . I just begged the jury to spare my son's life, but if Mr. Cooksey had helped me get ready to testify I know I could have told the jury more important things about my son's life." 2SH 11.

The Director presented only one rebuttal witness—defense investigator Dennis Waters. 6FH 334. Waters conceded that Cooksey never requested that he take a social history from Banks or obtain school records. *Id.* at 340. He confirmed that his efforts focused mostly on the guilt phase rather than the

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[11] James Kelly, a defense penalty-phase witness, also testified at the federal hearing. 6FH at 232. Prior to trial, he had never been contacted by the defense nor told that he would likely be a witness. Even on the morning of the sentencing hearing, he "was drunk." *Id.* at 233. In court, he spoke for the first time to Cooksey, but in that minute or two, he did not learn why he was being called. Kelly's trial testimony focused upon Robert Farr and Farr's use of bogus prescriptions to secure drugs. IOR 2248-50. (Kelly's name was spelled "Kelley" in the trial transcript, but "Kelly" in the federal. For consistency, "Kelly" is used throughout this brief.)

punishment phase of trial. *Id.* at 336. He said that Banks told him prior to trial that Banks had hitchhiked to Dallas during the early morning hours of April 12 but that Banks was unable to provide Waters with the name of the individual who picked him up, and therefore Waters did not believe Banks' account. *Id.* at 337.

3. The Cook Misrepresentation and Suppression Claim

Banks alleged suppression of evidence that critically impeached prosecution witness Charles Cook. Given Cook's central role in the State's case for guilt, Banks argued that such evidence was plainly material. 1FH 46. After Banks proffered Cook's declaration, the Magistrate Judge ordered limited discovery and a hearing. 2FH 584, 588. Included in the materials Banks obtained on April 14, 1999 were 74 undated transcript pages of Cook speaking to law enforcement officials shortly before Banks' trial.

This transcript, which had never been turned over to the defense, indicated, *inter alia*: (1) that when Cook gave his initial statement to police in April of 1980, Cook was frightened of being arrested and going to jail himself[12]; (2) that Cook had been drinking on the evening and early morning hours of April 23-24; (3) that police fed Cook critical information about the crime which he otherwise did not know[13]; and (4) that Cook's interrogators repeatedly

[12] "Well, you know the morning that I gave this statement, uh, I was scared and I wanted to hurry up and get it over with, so they won't lock me up, and I wanted to get back home to my family . . . I'm scared of jails, you know, I don't like being around no jail house." JA 31.

[13] Cook stated on three occasions that he knew the exact date that Banks had first come to Dallas because *the police had told him* the date of the murder before he gave his statement. Cook also said that before he gave his statement, *the police had told him* when the murder took place, and that they specifically referred to the murder victim as a "white boy." JA 20.

expressed concern about his credibility and his ability to testify at trial consistently with his initial, April, 1980 statement. An assistant prosecutor at one point told Cook forthrightly that his April statement must be "screwed up" because it lacked a great deal of information that Cook was now providing and that some portions of his statements simply made no sense. JA 24.

Prior to the hearing, both parties agreed that this transcript would be submitted into evidence. At the hearing, Banks introduced the transcript and extensively examined prosecutor Elliott about it. 6 FH 75. Elliott confirmed that the transcript had not been turned over to the defense at trial, *id.* at 47, and had been disclosed only to comply with the Magistrate Judge's discovery order. *Id.* 69. Counsel for the State also examined Elliott about the transcript, attempting to establish that it did not show Cook had been rehearsed or directed to testify falsely. 6FH 54-55.

SUMMARY OF ARGUMENT

Egregious error by both prosecution and defense counsel deprived Banks of a fundamentally fair verdict at both phases of his capital trial.

1. The record now demonstrates clearly that the prosecution relied on perjured testimony to secure Banks' death sentence. Robert Farr, who served as a paid informant in this case, repeatedly told the jurors that he had no relationship whatsoever with law enforcement. And the prosecutors themselves assured the jurors that Farr had testified honestly. This is a flagrant violation of Due Process under *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny. These deceptions were highly prejudicial because Farr was the State's central sentencing phase witness and provided the most important evidence to demonstrate that Banks would likely commit future acts of violence, a necessary finding for a capital sentence in Texas. *Kyles v. Whitley*, 514 U.S. 419 (1995). The evidence demonstrating the Due Process

violation was properly before the federal court because the prosecutors promised to provide such material at trial and suppressed it. Banks' repeated attempts to raise Farr's informant status at trial and again in state post-conviction proceedings were defeated due to the prosecution's suppression, interference and misstatement, not through inattention or neglect by Banks. *Strickler v. Greene*, 527 U.S. 263 (1999); *Williams v. Taylor*, 529 U.S. 420 (2000).

2. Defense counsel provided plainly deficient representation at Banks' capital sentencing hearing. Counsel performed no investigation and presented witnesses whom he had never interviewed. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). A reasonably conducted investigation would have revealed compelling mitigation evidence showing that Banks was repeatedly abused by his alcoholic father; that he functions in the borderline retarded range; that he has other significant mental impairments; and that since birth he has lived with a disfiguring skin disease that led to continuous, devastating humiliation and isolation. Such evidence is relevant to moral culpability, and the failure of counsel to prepare and present it was prejudicial. *See Williams*, 529 U.S. 362 and *Wiggins v. Smith*, 539 U.S. (2003). Banks' evidence supporting this claim was properly before the lower courts. *See Vasquez v. Hillery*, 474 U.S. 254 (1986).

3. The record also shows that the prosecutors suppressed a pretrial statement made by their key guilt-phase witness Charles Cook which would have shown the jury that Cook lied about not having been prepared by prosecutors for his testimony and that he repeatedly gave inconsistent statements during the prep sessions. This issue was not adjudicated below because the District Court determined that Banks had not specifically enumerated this claim in his petition, even though the issue was tried at the evidentiary hearing. The Court of Appeals in turn held that Banks was not entitled to a Certificate of Appealability on the question whether Rule

15(b) of the Federal Rules of Civil Procedure applies to habeas hearings. This ruling is flatly inconsistent with *Miller-El v. Cockrell*, 537 U.S. 322 (2003), because jurists of reason would find the issue debatable. Indeed, this Court has long assumed that Rule 15(b) applies in habeas. *Withrow v. Williams*, 507 U.S. 680 (1993). Given Cook's central role in the State's case for conviction-as the only witness tying Banks to the crime-the failure to disclose the statement violated Due Process. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

ARGUMENT

I. The State Violated Due Process By Concealing A Key Witness's Paid Informant Status And By Vouching for That Witness's Known False Testimony

The District Court and Fifth Circuit reached different results on this issue. The District Court accepted the Magistrate Judge's finding that "[t]he state attempted to portray Farr's involvement with Banks as one of an innocent acquaintance" while the record showed conclusively that Farr was a paid informant. It also accepted the Magistrate Judge's finding that Farr's misrepresentation prejudiced Banks.[14]

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[14] "Fan was one of the only two witnesses called by the State during the punishment phase. He testified that he, along with Banks and Marcus Jefferson, traveled to Dallas to retrieve the gun so that Banks could commit several armed robberies. The clear purpose of this testimony was to persuade the jury that Banks posed a continuing danger to society. Fan's testimony was misleading and inaccurate. At no time did the State correct Fan's erroneous testimony or announce Fan's paid informant status. Moreover, the State placed great reliance on Farr's testimony during the penalty phase. Indeed, the prosecutor characterized Farr's punishment phase testimony as `of the utmost significance,' because it helped establish that Banks posed a `danger to friends, and strangers alike.'" Pet. App. C at 43-44.

The Court of Appeals overturned relief for two reasons. First, it held that the district court had erred in granting a hearing and in considering Banks' evidence because Banks had failed to present the evidence in state court and had not shown cause and prejudice to excuse his failure. Pet. App. A at 16-23. Second, it held that any undisclosed evidence, while favorable to Banks, was not material under the materiality standard of *United States v. Bagley*, 473 U.S. 667, 682 (1985); because Farr had already been otherwise impeached, there was no reasonable probability that the jury would have found differently on the future-dangerousness special issue. Pet. App. A at 24-33.

A review of the record reveals that the District Court was correct to admit the evidence and grant Banks sentencing relief.

A. The Farr Claim Was Not Adjudicated in State Court Because the Prosecution Concealed the Relevant Facts

In Banks' 1992 state habeas filing, he pleaded that the prosecutors engaged in "wholesale misrepresentation of material facts to the jury at both phases of trial." 1SH 131-32. As an example, the petition alleged that "upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence [that] . . . would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a 'set up.'" *Id.* at 137.[15] The State made no response to this claim.[16] On February 22, 1993, the trial court filed Findings

[15] In support of this claim, Banks proffered the testimony of Demetra Jefferson, Banks' common-law wife. She stated, *inter alia*, that Robert Farr was addicted to prescription drugs and was well-connected with area law enforcement. 2SH 138-39.

[16] As with all claims pleaded in the petition, the State opposed an evidentiary hearing and asserted that the Court of Criminal Appeals could adequately resolve any disputes over the facts "upon review of official court records and without need for an evidentiary hearing." 4SH 42.

of Fact and Conclusions of Law that made no finding on this claim. Pet. App. G. The Court of Criminal Appeals accepted the trial court's recommendations and summarily denied relief. Pet. App. F at 3.

Banks again raised the claim in his federal petition and the State moved for summary judgment due to the absence of supporting evidence. 1FH 109. The Magistrate Judge at first denied discovery, 2FH 586, but ordered a hearing after Banks filed Farr's declaration.[17] 2FH 588.

The facts developed at the hearing showed that Farr fled Texas shortly after the Banks trial at the urging of his law enforcement handlers and would not have spoken to Banks' representative until the fall of 1996, nine months after state proceedings had concluded. JA 444. Trial prosecutor Elliott and Deputy Huff testified as well. Neither asserted that he had revealed Farr's informer status prior to the hearing or would have done so without the hearing. Indeed, before Huff would confirm that Farr was his informant, he sought clarification from the Magistrate Judge that he could answer the question. 6FH 87.

B. The District Court Correctly Found That Farr's Deception Denied Banks Due Process in Sentencing

After hearing all of the relevant evidence, the Magistrate Judge found that governing law required the State to disclose its relationship to Farr, that Farr's status as a paid informant was undisclosed, that portions of Farr's testimony were misleading and inaccurate and went uncorrected, and that Banks had established "materiality." 5FH 1132-33. Her recommendation to grant penalty relief was correct. The Due Process Clause forbids official misrepresentations of fact and

[17] The Magistrate Judge noted that the State objected to the hearing on *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), grounds, and carried that objection along with the hearing. 6FH 10.

requires disclosure of evidence that probably could aid the defense to obtain a different outcome.[18] The failure of a prosecutor to correct the false testimony of a prosecution witness also violates Due Process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that the Due Process prohibition against the State's knowing use of false testimony includes that which "goes only to the credibility of the witness").

This Court extended the rule prohibiting misrepresentation to require disclosure of known exculpatory and impeachment evidence in the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory material), and again in *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material). The *Brady* Court imposed upon prosecutors "an affirmative duty to disclose evidence favorable to the defense," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), in part because allowing them to withhold evidence that could change the outcome of a trial "casts the prosecutor in the role of an architect of a proceeding that does not comport to the standards of justice . . ." *Brady*, 373 U.S. at 88.[19]

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[18] *See, e.g. Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Miller v. Pate*, 386 U.S. 1 (1967).

[19] In subsequent cases, the Court has established the materiality standards that courts are to apply to determine whether misrepresentation, deception or withholding of evidence deprived the defendant of a fair trial. In *United States v. Agurs*, 427 U.S. 97, 103 (1976), the Court held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id. Agurs* distinguished the two remaining categories where helpful evidence was not disclosed based on the type of request made. *Id.* In *United States v. Bagley*, 473 U.S. 667 (1985), however, the Court "abandoned the distinction between the second and third *Agurs* circumstances," *Kyles*, 514 U.S. at 433, and established a common materiality standard for all favorable evidence, irrespective of the type of request made. *Id.* When the prosecution has withheld exculpatory or impeachment evidence, relief is to be ordered if the court finds a reasonable probability that the trier of fact would have reached a different outcome had the evidence been disclosed and used at trial. *Bagley*, 473 U.S. at 677.

There is no doubt that once the prosecutors decided to call Farr as a witness at Banks' trial, they had a duty to disclose that he had served as a paid informant in the case. *Hoffa v. United States*, 385 U.S. 293 (1966); *Bagley*, 473 U.S. at 676 (compensation paid to a witness can show interest or bias and is impeaching). Such disclosure is crucial because it allows the defense to cross-examine the witness and government agents about the compensation arrangement and the terms of the witness's relationship to the government and gives the jury a basis for assessing the witness's motivation.

Nor is there any doubt that the Magistrate Judge was correct in finding that Farr's status was not disclosed to the defense, and that his misrepresentations went uncorrected by the prosecution. The record unmistakably shows that the prosecutors made a deliberate choice both to let Farr lie about his status and then to assure jurors that his dishonest testimony was the truth. The District Court's acceptance of the Magistrate Judge's report on this point is unassailable. FRCP 52; *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

The Magistrate Judge also found that "the State placed great reliance on Farr's testimony during the punishment phase," and "characterized Farr's punishment phase testimony as 'of the utmost significance,' because it helped establish that Banks posed 'a danger to friends, and strangers alike.'" 5FH 1133. Under these circumstances, she concluded that the undisclosed impeaching material held a reasonable probability of a different result. *Id.* This finding of materiality under the proper standard, note 19 *supra*, is fully supported by the record.

The State's case for a death sentence was weak. Banks had no prior convictions, and the State produced no law en-

forcement witnesses who testified that he had a violent or dangerous reputation. Neither did the State present a mental health witness to opine that Banks would likely be a danger in the future. Instead, it presented only Vetrano Jefferson's testimony about his fight with Banks one week prior to the crime (since shown to be misleading, pages 33-34, *infra*), and Farr. Farr's testimony that Banks sought a pistol to commit armed robberies was most damaging to Banks because, if believed, it would provide a solid basis for the jury to find a reasonable likelihood of additional acts of violence. Thus, when the prosecutor subsequently argued his case for the death penalty, he focused on Farr's testimony, and no other evidence, to persuade the jury that the State had established the future dangerousness special issue. 1OR 2577-81.

Given the importance of Farr's testimony, it was critical to the State's case that the jurors find him credible. Therefore, the prosecutors portrayed him as a lay witness who had no prior or current association with law enforcement. During the guilt phase, defense counsel asked him directly, "have you ever taken any money from some police officers?" He replied unequivocally, "No." 9R 2274. In argument, the prosecution told the jury that it should find Farr especially credible, in part, because he admitted that he used illegal drugs. "You know, *he has been open and honest with you in every way.*" 1OR 2579 (emphasis added).

The suppression of Farr's paid informant status made this fiction possible. Had that information been disclosed, he and his testimony would have been cast in a dramatically different light. Despite the prosecution's earlier argument to the jury that it should "search [its] memories and recall the testimony and see if [it could] discern any reason why these people would falsify for vengence [sic] or for advantage or to save their hides," adding, "I didn't see any," 1OR 2448, Farr was no disinterested witness. Cooksey attempted to ask Farr, "And you know that you're drawn up tight over that, and you're going to testify to anything anybody wants to hear,

aren't you, Robert?" IOR 2505. Farr replied with a more powerful question, "Can you prove it?" *Id.* The State remained silent. Cooksey persisted, "I asked you a question, Robert." *Id.* Farr replied again, simply, "No, can you prove it?" *Id.* Cooksey could not prove it, and the State made no effort to provide the truth to either judge or jury.

Had Farr's status been known, the jury could have dismissed him as a thoroughly compromised witness who would do and say anything to remain on the street. The limited, and failed, attempts to impeach Farr created the false impression that such efforts were baseless. Had the truth been disclosed, the defense effort to show that the older, craftier Farr had set up the younger Banks would have made sense. Thus, the defense could have discredited Farr's most damning testimony, that Banks sought to arm himself in order to rob and, if necessary, kill again.

Given that the Magistrate Judge found Farr's testimony to be deceptive, Banks was entitled to relief if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Agurs*, 427 U.S. 97, 103 (1976). Banks' evidence surely met this standard. In addition, because of the central importance of Farr's testimony to the State's case for death, the suppression of compelling impeachment evidence comported a reasonable likelihood of affecting the outcome. *See Bagley*, 473 U.S. 667, 683 (1985).

C. The Fifth Circuit Disregarded Settled Law in Vacating Relief

1. *The Fifth Circuit's materiality ruling is erroneous*

The Circuit panel recognized that Farr's testimony was crucial to the State's case for death but nevertheless held that Farr's informant status was not material. Pet. App. A at 33. This conclusion was based upon three factors: Farr's

testimony was largely corroborated by other witnesses, Farr was generally impeached, and Banks had to satisfy the *Bagley* reasonable probability standard rather than the *Giglio* reasonable possibility standard because his petition raised only *a Brady* and not *a Giglio* claim. *Id.* at 31. The panel erred in each finding.

First, while Farr's account of the trip to Dallas was corroborated, his most damaging assertion—that Banks went to Dallas to arm himself and planned to commit armed robberies on the way home—was corroborated by no one. The State did not and could not establish Banks' future dangerousness on Farr's corroborated testimony; instead, the prosecutor urged the jury to find that Banks probably would commit violent future acts solely on the basis of Farr's assertion of Banks' intent. 1OR 2581.

Second, the impeachment evidence that was put before the jury-namely, Farr's drug habit and his unreliable reputation as an informant in another state—did not shatter his credibility. The prosecution got around that impeachment by touting Farr's disinterested status *in this case*. The revelation of Farr's informer role would have demolished the prosecution's ploy, and would have "put the whole case in a different light so as to undermine the credibility of the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), precisely because the prosecution went out of its way to depict Farr falsely as a disinterested witness with no axe to grind. Morever, one of the witnesses presented to impeach Farr appeared in court drunk, 6FH 233, and the other was about to take a job with the defense investigator. 1OR 2559-60. Their evidence was a far cry from what has now emerged as suppressed impeachment evidence: Farr's admission, the lead investigator's admission, *and* the prosecutor's admission that Farr was a paid informer and lied in denying it.

Third, Banks pleaded a misrepresentation claim in his petition, he proved misrepresentation, and the Magistrate

Judge found misrepresentation in both Farr's testimony and the prosecutor's knowing misleading of the jury. *Giglio*'s materiality standard applies.

2. *The Supporting Evidence Was Not Defaulted*

Solely because Banks did not produce Farr and Huff's testimony in state post-conviction proceedings, the Fifth Circuit taxed him for failing to do so and held that he had not shown sufficient cause to allow this evidence to be presented below. Pet. App. A at 18-20. This ruling affronts *Strickler v. Greene*, 527 U.S. 263 (1999), and *Williams v. Taylor*, 529 U.S. 420 (2000).

To determine whether a habeas petitioner has defaulted a claim or supporting evidence by not presenting it in state post-conviction proceedings, a federal habeas court must examine the entire state record to see if the State interfered with discovery or presentation of the relevant facts. In *Strickler*, the Court reviewed a court of appeals decision, much like the present one, which had held that state habeas counsel's insufficient diligence in investigating the basis of a *Brady* claim defaulted the claim. The court of appeals there found ample public notice to alert counsel to the existence of the witness statements that were subsequently disclosed, and held that counsel's failure to pursue these accessible leads defaulted the claim.

This Court disapproved that analysis and held that the reasonableness of state habeas counsel's conduct must be assessed in the light of relevant trial court proceedings. In those proceedings, the prosecutor purported to maintain an open-file discovery policy, and defense counsel had reviewed the file on several occasions. The documents that became the basis of the *Brady* claim were not in the file. Because it was reasonable for trial counsel to conclude that the prosecutor would discharge his duty and disclose all exculpatory mate-

rial, the Court reasoned that "if it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory material, but also the implicit representation that such material would be included in the open files tendered to defense counsel upon their examination, we think such reliance by counsel . . . in state habeas proceedings was equally reasonable." *Strickler*, 527 U.S. at 284; *accord*, *Williams v. Taylor*, 529 U.S. 420 (state habeas counsel did not default evidence of juror bias by failing to seek it in reasonable reliance on the assumption that the juror and the prosecutor would reveal such evidence if they were aware it existed).

These cases show that Banks adequately explained why his facts in support of the Farr claim were not first presented in state-court proceedings. At the trial level, he was told again and again that Farr was not an informant. These denials were more direct than in *Strickler*. Banks tried repeatedly to raise this issue in the trial court; Farr's denials and the prosecutor's ringing endorsement of Farr's deception are the reasons why Farr's informant status was not exposed at trial. Similarly, in state post-conviction proceedings, Banks attempted to raise the issue. But when he pleaded the claim, the prosecutor—like the one in *Williams*—said nothing; he ignored the claim, despite his knowledge of the facts supporting it. The record here further shows that Farr was not available: at the suggestion of his law-enforcement handlers, he fled Texas shortly after Banks' trial and went to California so that he could not be found by those, like Banks, whom he had implicated. JA 444. His declaration establishes unequivocally that he would not have provided Banks with any information until the fall of 1996, long after the state courts had dismissed Banks' habeas case. JA 444. Banks had no reason to believe that Huff, a member of the prosecution team, would belie Farr's explicit trial testimony, backed by the prosecutor's

assurances that Farr was telling the truth. Moreover, because of this record, he had no good-faith basis to seek discovery.[20]

In short, Banks repeatedly sought to litigate his Farr claim in the state courts; his efforts were frustrated by suppression, denial and deception on the State's part. The Fifth Circuit erred in overturning relief on the claim because of Banks' supposed "failure" to present his finally discovered evidence earlier.

II. The Fifth Circuit Erred in Reversing The District Court's Grant of Relief for Counsel's Ineffectiveness

The District Court and the Fifth Circuit reached different results on Banks' Sixth Amendment claim. Although there was no disagreement that trial counsel's performance was deficient, the courts below disagreed in the application of the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and about what evidence of prejudice was properly before them.

A. Banks Presented the Same Claim and Supporting Facts Before the State and Federal Courts

In state court, Banks' ineffective assistance claim alleged, *inter alia*, that trial counsel did not prepare for the penalty phase. Counsel made no investigation into Banks' lifelong handicaps and disabilities and made no effort whatsoever to prepare penalty-phase witnesses for their testimony or even

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[20] Banks did seek discovery on two other prosecution misconduct issues for which he was able to proffer a good-faith basis. He sought discovery and funds to investigate his jury discrimination claim and the Cook impeachment claim, and supported these requests with affidavits attesting a likelihood of merit. These motions were ignored and never acted upon by the state court, even after Banks filed supplemental motions and requests for rulings. JA 214-32.

to speak to them before calling them to the stand. 1SH 112-15.

Banks proffered the affidavits of his parents, a mental health professional, and other witnesses in support of this claim. Mrs. Banks' statement explained that (1) her husband's drinking nearly tore the family apart and often required her and the children to run away from home to avoid physical harm; (2) her son suffered from a life-threatening hyper-allergenic condition from birth that led to constant humiliation and shattered his self-image; (3) it was only after the guilty verdict that trial counsel Cooksey urged her to contact ministers for the penalty phase; and (4) because she had no prior warning that counsel would call her as a witness at the penalty phase, all she could think to do. when called was to beg the jury to spare her son's life. 2SH 11. Mr. Banks, Sr.'s proffer said that he too had no warning that he would be called. 2SH 15. (He also said that during trial, the State offered Delma, Jr. a life sentence and that his son turned it down because he was innocent. 2SH 17.) Demetra Jefferson's proffer stated that she informed defense investigator Waters before trial that her brother, Vetrano Jefferson, had started the fight with Banks that ended with Banks hitting Vetrano with a pistol-a basis for the State's submission that Banks represented a future danger and so must be sentenced to death-and that she would have so testified if called. 2SH 137.

Banks also proffered testimony from psychologist Gregorio Pina.[21] Dr. Pina determined that Banks suffered from brain impairment which caused significant language and cognitive disabilities. He also found that Banks had experienced numerous intense traumas during his childhood as a direct result of his abusive, alcoholic father's beating and

[21] An initial report by Dr. Pina was filed with the state habeas petition in January, 1992; a supplemental report was filed with the Court of Criminal Appeals in February, 1993. JA 198-211.

terrorizing him. He confirmed that Banks suffered from chronic bleeding skin and hives throughout his life and that these "largely untreated symptoms" led to disfigurement and distress. Dr. Pina proffered Mr. Banks' Stanford-Binet Short Term Memory Intelligence score of 67 and his Abstract and Visual Reasoning score of 61. JA 206. Dr. Pina concluded from Banks' entire profile that he was likely to be a nonviolent inmate in a highly structured environment such as prison.[22] JA 210-11.

The State's answer urged denial of the claim without a hearing and asserted facts as if they had already been established. For example, the answer asserted that "'the totality of the representation' afforded the Applicant in the instant case is beyond reproach. At all times Cooksey was fully prepared for the sentencing hearing, despite allegations to the contrary. He began preparation of his punishment phase file well in advance of the actual sentencing date. Cooksey affidavit" 4SH 19. (The answer several times referred to a "Cooksey affidavit," though no such affidavit accompanied it. Banks replied that "the State cannot properly rely on 'strategic reasons' for Cooksey when he has been unwilling to sign the State's prepared affidavit."[23] 5SH 9.

The trial court recommended denial of the claim, summarily reciting that Cooksey provided effective assistance, "includ[ing] adequate and effective investigation of matters relevant to both the guilt/innocence and punishment phases

[22] Banks also proffered the testimony of Robert Harlan, an auto mechanic, who opined after reviewing the record that it was highly unlikely that Mr. Whitehead's car could have made the trip from Texarkana to Dallas—180 miles—without repairs that would have taken a trained mechanic hours to complete. 2SH 149.

[23] Thereafter, Cooksey filed a brief affidavit in which he stated without particulars that "the decisions made and the actions taken on behalf of Delma Banks were the result of my professional judgment." 5SH 137. He said he was unaware of Banks' mental impairment and skin ailments. *Id.*

of trial." Pet. App. G at 3, 7. The Court of Criminal Appeals adopted this finding. *See* Pet. App. F.

In his federal petition, Banks pleaded the same claim. 1FH 32-38. Because the state courts had conducted no hearing and made no findings of fact, the Magistrate Judge ordered a limited hearing directed at, *inter alia*, the adequacy of trial counsel's preparation for the penalty phase and failure to have Banks examined by a mental health expert. 2FH 626-28.

B. Both Courts Below Agreed, and Properly Held, That Counsel's Performance Was Deficient

In two recent cases, this Court has provided detailed guidance concerning the responsibility of counsel to prepare adequately for a capital sentencing hearing. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court determined that counsel's failure to begin preparation for the sentencing hearing until a week before trial, and subsequent failure to uncover and present evidence showing his client's highly traumatic and abusive childhood, showed deficient performance. In *Wiggins v. Smith*, 539 U.S. __ (2003), the Court held that while counsel did take steps to identify helpful mitigating evidence, his performance was unreasonable because he failed to follow up on information indicating that Wiggins had a depraved childhood and had been the victim of sexual abuse.

By these lights, the present record fully supports the lower courts' conclusions of deficient performance. Before trial, Cooksey made no investigation of Banks' social history or mental health. He did not obtain a mental-health evaluation of Banks, or attempt to speak to State penalty-phase witnesses, like Vetrano Jefferson, who would have spoken to him. Moreover, he delegated to Banks' mother—at 11:00 p.m. after the guilty verdict and when she was on her way to a hospital after collapsing—the task of assembling mitigation witnesses for the following morning. 6FH 225-26. He put

those witnesses on the stand without ever speaking to them, and during the penalty hearing admitted on the record that he did not know who the witnesses were or how they could help. 10R 2536. This was plainly substandard performance.

C. The District Court's Prejudice Determination is Fully Consistent with *Williams* and *Wiggins*

The Magistrate Judge properly considered all the available evidence and held that Banks had established a reasonable probability of a different outcome. *5FH 1206-07*. This judgment, approved by the district court, is demonstrably correct.

Banks' undeveloped mitigation evidence, which the district court credited and which the State made no effort to dispute, is precisely the kind that this Court has found relevant to moral culpability. *Wiggins*, No. 02-311, Slip Op. at 23 (June 26, 2003); *Williams*, 529 U.S. 362; *Penry v. Lynaugh*, 492 U.S. 302 (1989). The present case is very similar to *Williams* in regard to what the jury heard, and did not hear, in mitigation. There, trial counsel presented testimony from Williams' mother and two neighbors and a taped statement from a psychologist. "The three witnesses briefly described Williams as a 'nice boy' and not a violent person." *Williams*, 529 U.S. at 369. The psychologist's statement informed jurors that in prior crimes, Williams had removed bullets from his gun so he would not hurt his victims. In post-conviction proceedings, Williams presented evidence that as a child, he had endured extensive abuse and neglect at the hands of his parents, was borderline mentally retarded, and was likely to be a non-violent prisoner. *Id.* at 395-96. The Court found that the absence of this evidence at trial "prejudiced Williams within the meaning of *Strickland*," *id.* at 396, even though Williams—altogether unlike Banks—had an extensive record of violent crimes.

Banks' jury heard a similarly meager mitigation case and did not learn of the abuse Banks endured from his alcoholic father, nor of his borderline intellectual functioning, nor of

his other neurological deficits, nor of his lifelong chronic skin pain and disfigurement and the resulting social rejection and isolation, nor of his likelihood for a non-violent adjustment to prison.

While Banks' unheard mitigation alone makes his case quite like *Williams*, the cases differ significantly with regard to aggravation. Williams made no effort to show that the State's aggravating evidence was inaccurate; Banks discredited much of the State's aggravating evidence. Robert Farr recanted his testimony that Banks planned to commit acts of violence. JA 438-39. Vetrano Jefferson made clear that he, not Banks, was the aggressor, in their brief fight. 6FH 166. The Magistrate Judge credited both. 5FH 1112, 1131-32. Thus, unlike *Williams*, little remains of the State's case for the death penalty beyond the crime itself. Because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support," *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the District Court correctly determined that trial counsel's dismal performance prejudiced Banks during the penalty phase of his capital trial.

D. The Fifth Circuit Erred in Denying Relief

Although the district court found that Banks met his burden of proving a reasonable likelihood of a different result, the Fifth Circuit reversed. It concluded that the district court had erred in considering evidence from witnesses whom Banks had not proffered in the state courts. Moreover, instead of inquiring whether the remaining mitigating evidence, considered collectively, demonstrated a reasonable likelihood of a different result, the Circuit panel erroneously weighed each category of mitigation separately and found each—in isolation—wanting. Pet. App. A at 36-44.

1. *Banks did not rely upon unexhausted evidence*

The Court of Appeals believed that because Banks did not proffer before the state courts the testimony of Vetrano Jefferson and Dr. Cunningham, their testimony below was not exhausted and thus could not be considered. Pet. App. A at 38, 42. This ruling is inconsistent with precedent because Banks exhausted both his legal claim of penalty-phase ineffectiveness and its factual basis by proffering evidence comprehending the testimony that Jefferson and Cunningham gave below.

Before a federal habeas petitioner can present facts in support of a constitutional claim, s/he must have presented the state courts with the same factual basis for the claim. No more is required. *See Vasquez v. Hillery*, 474 U.S. 254 (1986). Banks did this with respect to the facts of his ineffectiveness claim.

a. The facts to which Jefferson and Cunningham testified were pleaded and proffered in state court

Banks' state petition asserted in support of his Sixth Amendment claim that prosecution witness Vetrano Jefferson's penalty-phase testimony was misleading in casting Banks as an unprovoked aggressor, 1SH 112, when in truth Jefferson was intoxicated and was responsible for the fight. To sustain this allegation, Banks proffered the testimony of Demetra Jefferson, Vetrano Jefferson's sister, who witnessed the events. 2SH 137.

Banks' state petition also alleged in detail that trial counsel had not performed a social or psychological investigation for mitigating evidence. 1SH 91-103. To sustain these allegations, Banks proffered, *inter alia*, reports by psychologist Gregorio Pina evaluating Banks' history and clinical condition. JA 198-211.

The State offered no contradictory facts; it urged the state courts to deny the claim without an evidentiary hearing. The trial court did not hold a hearing, made no findings, and summarily concluded only that counsel had provided effective assistance at all phases of the trial. That court never reached the issue of prejudice in recommending a denial of relief. The Court of Criminal Appeals accepted this recommendation by *fiat*. *See* Pet. App. F.

b. The federal testimony was consistent with these proffers

In the absence of any state-court factfinding, the Magistrate Judge properly conducted a limited hearing on this claim. *See Townsend v. Sain*, 372 U.S. 293 (1963). To prove the alleged fact that Vetrano Jefferson's penalty-phase testimony was misleading, Banks presented Vetrano Jefferson himself instead of Demetra Jefferson. Vetrano Jefferson's testimony is entirely consistent with that proffered to the state court-that he, rather than Banks, was the aggressor and initiator in the fight between the two that was the subject of his penalty-phase testimony.

Banks also called Dr. Cunningham, rather than Dr. Pina, to testify about Banks' disabilities and social history. The scope of Dr. Cunningham's testimony was consistent with the contents of Dr. Pina's proffered state-court testimony. Dr. Cunningham discussed Banks' intellectual functioning and limitations, the allergies and suppurating sores and their effects upon Banks' development, Delma, Sr.'s alcoholism and abusive treatment of Delma, Jr. and other family members. Like Pina, he offered an assessment of Banks' likelihood to commit future violent acts.[24] 6FH 243-63.

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[24] In only one respect was Cunningham's testimony different in kind from Pina's proffer. Pina came to the view after his clinical assessment that Banks would likely pose no particular danger in a controlled prison environment. Cunningham came to same conclusion after performing a risk assessment, and after having thoroughly reviewed the literature on this matter that was in existence at the time of Banks' trial. 6FH 243-63.

Thus, the *facts* presented by these witnesses at the hearing below had been specifically pleaded and proffered before the state courts. The sole difference was that Banks used different *witnesses* to present the facts. This Court has never held that fact-exhaustion requires a habeas petitioner to present the same witness at a federal hearing as before the state court. The relevant inquiry is whether the facts presented before the federal court substantially or fundamentally altered the claim that was presented before the state court. Here they did not.

2. The panel misapplied Strickland's prejudice test

The Court of Appeals also erred in its purported application of *Strickland's* prejudice test to the facts it deemed exhausted. In *Strickland*, the Court explained that:

> When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court the sentencer . . . would have concluded that the hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

466 U.S. at 695. And recently in *Wiggins*, the Court stressed that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins v. Smith*, No. 02-311, Slip Op. at 22 (June 26, 2003).

Instead of weighing the totality of the mitigating evidence, the Court of Appeals segregated the evidence into three discrete categories, Dr. Pina's mental health testimony, Banks' parents' testimony, and Vetrano Jefferson's testimony. With regard to Dr. Pina's testimony, even though Pina reported brain damage, the terrorizing of Banks by his father, and the ghastly skin disorder whose oozing lesions disfigured Banks

and destroyed his sense of self, the panel concluded that the evidence "while possibly mitigating, does not present a reasonable probability that, had the jury been presented with it, it would not have assessed the death penalty." Pet. App A at 39.[25] The panel next considered the parents' testimony, framing the issue as whether counsel's failure to present that evidence raised a reasonable probability that "the jury would not have assessed the death penalty." *Id.* at 40. Then, after ruling that Vetrano Jefferson's testimony was not exhausted and thus could not be considered, it held alternatively that this evidence, also taken by itself, failed to show a reasonable probability of a lesser sentence. *Id.* at 41. Never did the panel weigh *all* of this evidence against the aggravating evidence as *Strickland* and its progeny require. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995).

III. The Court of Appeals Erred in Denying a COA On the Cook Nondisclosure Claim

A. The Record Leaves No Doubt That The Non-Disclosure Claim Was Litigated By Implied Consent of the Parties Within the Meaning of FRCP 15(b)

Beginning with his habeas petition, continuing through efforts to gain discovery, and leading up to the evidentiary hearing below, Banks again and again put the State on notice that his *Brady* claim concerning Charles Cook included, but was not limited solely to, the assertion that Cook testified pursuant to a deal for dismissal of the arson charge pending against him. While the State did oppose the hearing on all claims under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), it never argued that Banks was expanding his legal claim to cover grounds beyond those he had pleaded. Thus, when the

[25] The characterization of this uncontested evidence as only "possibly mitigating," is also contrary to this Court's repeated holdings that mental limitations, child abuse and major medical ailments are unquestionably mitigating. E.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989).

subject of non-disclosure of the pretrial statement was addressed at the hearing, both Banks and the State agreed that the 74 pages of transcript would be admitted, and both examined prosecutor Elliott about its origin, contents, and belated disclosure to the defense. 6FH 43-47, 103-05. If ever an issue was tried with the consent of the parties, it was this one.

Banks gave adequate notice of this issue in his petition. He alleged, *inter alia*, a broad prosecutorial misconduct claim and charged that the prosecution had withheld *Brady* material. 1FH 46. He provided a specific example—the allegation of a deal for Cook's testimony but he also made clear that the grounds of the claim "includ[ed] but [were] by no means limited to" that one example. 1FH 43. He also moved for discovery on the claim. *Id.* at 291.

The State's answer leaves no doubt that it understood that Banks was pleading a broad suppression claim. The State acknowledged, under the heading "The State did not suppress favorable, material evidence," that *Brady* imposes "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," and that "such favorable evidence includes impeachment evidence." 1FH 204-05. The response further acknowledged that Banks was contending that "the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.* at 207.

Continuing efforts begun in state court, Banks again tracked down Cook, and this time secured a signed declaration. JA 322-27. Among other things, Cook asserted, contrary to his trial testimony, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. JA 325. This led Banks to move again for discovery. Largely because of Cook's detailed declaration, the Magistrate Judge granted limited discovery and ordered the production of records in the possession of the State that concerned, *inter alia*, "interview notes, and all other written

or recorded documentation" concerning Charles Cook. 2FH 621.

In compliance, the State disclosed, for the first time, portions of the District Attorney's file. One document contained in that file consisted of 74 transcript pages of a pretrial interview between law enforcement officials and Charles Cook. After these disclosures, and well in advance of the scheduled evidentiary hearing, the Magistrate Judge issued an order establishing the issues upon which the parties could submit evidence. The court understood that Banks wanted to present evidence on three issues, the first one being "whether Petitioner's Fourteenth Amendment rights were violated by the State's withholding critical exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr." 2FH 625-26. The Order restated the State's position on this issue: no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." 2FH 626. Notably the State made no objection of surprise, no assertion that Banks was expanding his Due Process claim, and no contention that any portion of the issues upon which the Magistrate Judge would hear evidence was unexhausted or unanticipated.

Thereafter, the State provided notice that it would use this very exhibit to defend against the Due Process claim, 3FH at 689, and that it would call Assistant District Attorney Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." 3FH 689. Similarly, Banks made it very clear that he would use the Cook pretrial statement—Exhibit B-04—to establish the Due Process claim. 3FH 736.

At the hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook took center stage. Counsel for Banks opened by stating that he would prove, *inter alia*, that the trial prosecutors had

unconstitutionally withheld impeachment evidence with regard to Cook. *See* 6FH 8. Banks' counsel examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material. 6FH 25-27. When he examined Elliott about Cook's statement, Elliott confirmed that the document, Exhibit B-04, had *not* been disclosed at trial. 6FH 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the document that showed a staff prosecutor coaching Cook on how to answer questions concerning an earlier, April, 1980 statement by Cook which, in the interviewer's view, made little sense. 6FH 64-68. On further redirect, Elliott was asked yet additional questions about inconsistencies between Cook's trial testimony and statements in Exhibit B-04. 6FH 72-74. Without objection, the Magistrate Judge admitted the exhibit into evidence. 6FH 75. Banks included an extensive discussion of this issue in the Proposed Findings of Facts and Conclusions of Law which he submitted to the Magistrate Judge, and he reiterated that discussion in his objections to the Magistrate's report and recommendation. 4FH 921, 930-31, 953-60; 5FH 1184, 1185-86.

Given the undisputed facts that (1) Mr. Banks explicitly pleaded a Due Process claim of suppression of *Brady* impeachment material in his petition; (2) the State made clear in its first responsive pleading that it understood the claim to include suppression of impeachment material concerning Mr. Cook; (3) the discovery process forced the State to reveal for the first time Cook's extensive eve-of-trial statement; (4) the Magistrate Judge and the parties agreed that one issue to be litigated at the evidentiary hearing was whether the trial prosecutors withheld material impeachment evidence; (5) the pretrial statement, Petitioner's Exhibit B-04, was introduced and admitted without objection as evidence relevant to the claims at issue; and (6) state witnesses were extensively questioned about both the circumstances of the taking of this statement and its tardy disclosure, it could not be plainer that

this issue was "tried" by consent of the parties.[26] *See, e.g., Mongrue v. Monsanto Co.*, 249 F.3d 422, 427 (5th Cir. 2001); *Steger v. General Electric*, 318 F.3d 1066, 1077 (11th Cir. 2003); *Clark v. Martinez*, 295 F.3d 809, 815 (8th Cir. 2002); *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001); *see also, Pals v. Schepel Buick*, 220 F.3d 495, 501 (7th Cir. 2000).

B. The Cook Issue Was Properly Before the Federal Courts, Pursuant to Federal Civil Rule 15(b) and the Rules Governing Habeas Corpus Proceedings

Although Banks' petition claimed that the State withheld *Brady* material concerning key guilt-phase witness Charles Cook, and although that issue was tried at the evidentiary hearing, the lower courts refused to adjudicate the claim with respect to the non-disclosure of Cook's 74-page statement. Their refusal to reach the merits of the issue and to grant relief on it was unwarranted. Even if they were correct that this portion of the claim was not sufficiently pleaded,[27] it was

[26] That the Fifth Circuit should have considered the Cook prosecutorial misconduct claim as litigated by consent of the parties is further supported by this Court's analysis in *Roell v. Withrow*, 123 S.Ct. 1696 (2003). In *Roell*, the Court reaffirmed the principles of litigation by consent of the parties: when parties appear before a court, litigate their claims, stand silently as the court adjudicates those claims and express no reservation about the court's jurisdiction over the claims, the parties are deemed to have consented to litigation in that court. *See id.* at 1700, 1701 ("[T]he record shows that [the petitioners] voluntarily participated in the entire course of the proceedings before the Magistrate Judge, and voiced no objection when, at several points, the Magistrate Judge made it clear that she believed they had consented.").

[27] In fact, the issue was adequately pleaded in Banks' petition. Rule 2(c) of the Rules Governing § 2254 Cases sets forth the pleading standard for claims in habeas petitions. It provides in relevant part, "[the petition] shall specify all the grounds which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each

properly before the district court for adjudication under Rule 15(b) of the Federal Rules of Civil Procedure.

Rule 15(b) provides: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." A "failure to so [actually] amend does not affect the result of the trial of these issues." The district court, however, held these provisions inapplicable to evidentiary hearings in habeas corpus matters, and the Fifth Circuit denied a COA to review that holding.

Both of these rulings fly in the face of precedent. It is settled that the Federal Rules of Civil Procedure apply to habeas corpus proceedings unless there is some inconsistency between a particular civil rule and the Rules Governing § 2254 Cases in the United States District Courts or a traditional peculiarity of habeas practice.[28] There is no such

of the grounds thus specified." The Court has construed this provision as requiring litigants to plead facts sufficiently so as to show "a real possibility of constitutional error," *Blackledge v. Allison*, 431 U.S. 63, 75-76 & nn.7 & 8 (1977), or "the factual underpinnings of [the] claim[]." *McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in part and dissenting in part). Banks pleaded the suppression of *Brady* material, and he could not pinpoint the exact nature of the suppressed material solely because of the State's successful withholding of the statement in question. 1FH 46.

[28] Rule 11 of the Rules Governing § 2254 Cases in the United States District Courts provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Federal Civil Rule 81(a)(2) states that the civil rules apply to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Consistently with these provisions, the Court has long applied a straightforward approach in determining which rules of civil procedure apply in the habeas context: The civil rules presumptively apply unless a § 2254 rule or an accepted habeas practice is incompatible with the specific civil rule. *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 267-68, 269 (1978); *Hilton v. Braunskill*, 481 U.S. 770, 775-76,

inconsistency in the case of Rule 15(b). Indeed, this Court has previously characterized Rule 15(b) as one of a number of "noncontroversial rules" that the federal courts have applied in habeas proceedings. *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969).[29] More recently, in *Withrow v. Williams*, 507 U.S. 680, 695-96 & n.7 (1993), the Court assumed Rule 15(b)'s application to a habeas proceeding. There, a prisoner had filed a one-claim federal petition alleging that his custodial statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court found that statements taken from him prior to the administration of *Miranda* warnings should have been suppressed and ordered a new trial. In addition, it adjudicated a second issue and held that his statements taken *after* the administration of the *Miranda* warnings were involuntary. The warden protested that this second adjudication was improper because Williams had not raised the involuntariness claim in either the state courts or his federal habeas petition. Williams argued that although he had not pleaded the involuntariness claim in the petition, it had been tried by implied consent of the parties. This Court expressed no qualms about the general applicability of Rule 15(b) to habeas cases but reversed the lower court's grant of relief on the involuntariness ground because the record "reveal[ed] neither thought, word, nor deed of [the warden] that could be taken as any sort of consent to the determination of an independent due process

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& n.5 (1987) (quoting *Harris v. Nelson*, 394 U.S. 286, 294 (1969)); *see also McFarland v. Scott*, 512 U.S. 849, 866 n.2 (1994) (Thomas, J., dissenting) ("The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus statute.").

[29] This has been accepted Fifth Circuit practice as well. *See, e.g., James v. Whitley*, 926 F.2d 1433, 1435 (5th Cir. 1991); *Robinson v. Wade*, 686 F.2d 298, 304 & n.10 (5th Cir. 1982); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 914 (5th Cir. 1966).

claim, and [the warden] was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on the claim's resolution." *Withrow*, 507 U.S. at 696. *See also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring).

This line of authority strongly suggests that the decision of the district court below categorically barring the application of Rule 15(b) to habeas corpus evidentiary hearings is wrong. At the least, it is a decision that jurists of reason would find debatable; and thus the Court of Appeals erred in denying a COA to review it. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1039 (2003).

C. The Suppressed Evidence Allowed The Prosecutors to Misrepresent Cook's Credibility

The suppressed pretrial statement establishes that Cook perjured himself when he denied at trial that he had spoken with prosecutors about his testimony. The prosecutors not only failed to correct this false testimony but urged the jury to believe it. Such sponsorship of perjury is a plain violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Alcorta v. Texas*, 355 U.S. 28 (1957).

Moreover, the suppressed statement contains an extraordinary array of impeachment evidence, the suppression of which undermines confidence in the outcome of the guilt phase of Banks' trial. Given that Cook's credibility was key to the State's case for a capital conviction, and that the defense's trial strategy was to demonstrate that he was an untrustworthy witness, there is a reasonable probability of a different result had the pretrial statement been timely disclosed to the defense. *Kyles v. Whitley*, 514 U.S. 419 (1985).

1. *The* Napue/Alcorta *violation*

District Attorney Raffaelli established during opening statements that Charles Cook was a central witness and that only he could link Banks to the crime. 9R 2128-30. Yet,

contrary to their promise that the jury would gain a full picture of the case from Cook's testimony, the prosecutors allowed Cook to obscure significant information and mislead the jury time and again about his credibility and his incentive to testify against Delma Banks.

The prosecution permitted Cook to testify perjuriously that he had never rehearsed his trial testimony with the prosecutors. 9R 2314.[30] In closing arguments, the prosecution assured the jurors that they had no reason to doubt Charles Cook's credibility. 10R 2450, 2453[31] Again, the truth—documented in 74 pages of pretrial rehearsal transcript—is that not only did Cook lie when he claimed not to have discussed his testimony with the prosecutors, but the prosecutors themselves misrepresented the truth and withheld evidence bearing directly on Cook's credibility.[32]

2. *The extraordinary array of impeachment*

After Cook's direct examination, the prosecution turned over to the defense Cook's April, 1980 statement to police. 9R 2312. Cooksey indicated that that was the first time he had seen Cook's statement and asked for a recess so that he could read it before cross-examining Cook. *Id.* Cooksey's central defense strategy was to impeach Cook. *Id.* at 2314-15, 2322-23, 2324, 2465, 2466-68, 2469, 2470, 2471. Had the

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[30] "A: I haven't talked to anyone about [my testimony]. Q: Haven't talked to anybody? A: No, sir. Q: Mr. Raffaelli just put you on the stand not knowing what you were going to testify to? A: That's what I'm telling you."

[31] "Charles Cook didn't hide anything from you . . . Charles Cook brought you the absolute truth."; "Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth."

[32] Cook also testified during the federal evidentiary hearing that he met several times with trial prosecutors before he testified against Banks. 6FH 134 ("Prior to trial, I . . . spoke extensively with trial prosecutors."); *id.* at 146 ("I participated in three or four . . . practice sessions prior to the [Banks] trial.").

prosecution abided by its promise to turn over all discoverable material, which certainly included the 74-page pretrial transcript, Cooksey would have been armed with an impeachment arsenal. Instead, the State disclosed only the earlier, April statement, which was for the most part consistent with Cook's trial testimony. This consistency was itself concocted: the 74-page undisclosed transcript reveals the prosecutors literally hammering Cook's testimony into the mold of the April, 1980 statement.

Comparison of the disclosed April, 1980 statement, the undisclosed 74-page transcript, and Cook's trial testimony reveals the following inconsistencies, among others:

Concerning Blood on Banks' Clothes and Banks' Change of Clothes: In the 74-page transcript, Cook was asked to tell the prosecutors when he first noticed blood on Banks' pants. He replied that he saw the blood on Banks' pants after Banks took Cook's wife to work that morning. JA 24. Assistant District Attorney McDaniel berated Cook for this response, saying "It does not make any sense that he changed clothes and you got back into the car and went riding and then you noticed blood on his pants because if he changed clothes he wouldn't have had any blood on his pants." JA 24. McDaniel then provided specific direction on how to handle this problem if it arose at trial: "[T]hey are going to ask you about it and you are just going to have to explain it. That you might [sic] a mistake and you got your facts out of sequence." JA 24. Immediately after "correcting" Cook's chronology of when Banks had changed his clothing, McDaniel questioned Cook about contradictory statements that Cook had made regarding the color of the clothing. JA 24.[33] Then McDaniel

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[33] Initially, during Cook's pre-trial testimony, Cook stated that "[he] put him in a pair of blue pants," and "a [blue] flowered shirt to go with [his] blue pants." JA 6. Yet, in Cook's April statement, he had given a different account, stating that he gave Banks a brown pair of pants and blue shirt. McDaniel pointed out the discrepancy. JA 24. In response, Cook claimed that his April statement was incorrect. JA 24.

gave Cook this instruction: "Anyway, *the way this statement should read is that* . . . on the way back [from the hotel] you noticed blood on [Banks'] pants so you took him home and changed his clothes[.]" JA 26 (emphasis added). Apparently, Cook got the message. At trial, Cook testified to that order of events and, in addition, avoided giving any specific description of the clothing. 9SR 2281-91.

Concerning When Cook First Spotted Banks' Gun: In April, Cook told the prosecutors that he first noticed Banks' gun on Saturday night before Banks confessed to the killing. JA 447. Yet, in the 74-page transcript, at first Cook said that he saw Banks' gun on Sunday night when he took the gun from him because he wanted to protect his family. JA 11. The 74-page transcript reflects that after hearing this statement, McDaniel inquired whether Cook had ever seen the gun before Sunday night. JA 11. Cook responded that the first time he saw the gun was in the console of the car on the Saturday morning that Banks arrived in Dallas. JA 11. When McDaniel asked Cook whether he could tell him what was inconsistent between what he had just reported and what he had told police in April, Cook recognized that in April, he had not reported seeing the pistol in the console of the car, as he had just a few minutes prior to McDaniel's question. JA 28. Nevertheless, during the pretrial rehearsal session, Cook again stated not only that he saw Banks' pistol on Saturday morning in the car, but that he showed Banks his own gun when they returned to Cook's home on Saturday in order to demonstrate that he was not intimidated. JA 35. At trial, Cook testified that he first saw the gun on Saturday night when Banks allegedly confessed to him and that he felt threatened thereafter. 9R 2296-97. The trial testimony was consistent with his initial statement to police, that was turned over to the defense. JA 447.

Concerning Disposal of the Car: Cook gave conflicting accounts of his disposal of the car that he said Banks was driving. In the 74-page transcript, Cook stated that he had

left the car on "Town Drive" and left the keys in the ignition. JA 12-13. Yet, in his April statement, Cook had said that he had left the car at "Canna Drive" and left the car keys under the seat. JA 448. Again, McDaniel read Cook his April statement that contained the inconsistent story; but either McDaniel did not mention the name of the street or that name was not transcribed.[34] Thereafter, McDaniel said, "Now you told me a minute ago you left the keys in the ignition." JA 30. Going along with the version that was consistent with his April statement, Cook replied, "I left them up under the seat." JA 30. Then McDaniel said, "Which one is it[?]" Cook responded, "I left them up under the seat." JA 30. At trial, Cook simply testified that he dumped the car on Canada Drive on Tuesday morning, and said nothing about where he left the keys. 9R 2303-04.

Concerning the Disposal of Other Physical Evidence: In his April statement, Cook indicated that on the day after Banks left Dallas, Cook not only dumped the car but sold the car's radio, booster cables, tool box and Banks' pistol to Cook's friend across the street. JA 448. In the 74-page transcript, Cook said that *Banks* sold the car's radio. JA 13. Also, when McDaniel asked Cook when Cook sold the items, Cook demonstrated considerable confusion about which day it was. JA 13-14. After questioning Cook about his other inconsistent statements, McDaniel returned to the issue of whether Cook or Banks sold the car's radio. McDaniel said, "Now you told us that Delma sold that cassette . . . [.]" JA 30. Cook maintained his position that Banks had sold the radio. JA 30. As a result, McDaniel asked, "Your statement says that you sold it . . . That's not right?" *Id.* Cook said, "No[.]" JA 30. At trial, the benefits of McDaniel's coaching were evident during this part of Cook's testimony. Cook told

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[34] The 74-page transcript at this point reads: "[T]he next morning around 6:00 I took the hot car and left it at the end of _____drive with the keys under the seat." JA 30.

the jury that he sold his neighbor the tool box, the cables, and the gun, on Tuesday evening. 9R 2305. He did not mention anything about a car radio. *Id.*

Concerning Activities in Dallas on Saturday Morning: In the 74-page transcript, Cook reported that on the Saturday when Banks arrived in Dallas, Cook initially took Banks to a friend's home where Banks could take a bath. JA 6. Banks disappeared upstairs in Cook's friend's home for several minutes and then returned without bathing and asked Cook to take him to a motel. JA 6. Cook never mentioned this significant detail in his April statement. Presumably this fact would have been important to police because, if true, it would have provided additional witnesses who had seen Cook and Banks together and could have connected them to the Mustang. Again, McDaniel noticed the discrepancy; McDaniel questioned Cook specifically about why Cook had left the visit to the friend's house out of Cook's April statement; and McDaniel went on to question whether other problems beset Cook's stories. ("Okay, there is nothing in your [April] statement about taking him to a friend's house . . . Didn't you tell me before that the police told you you needed to put everything in there you knew? . . . But you didn't do that. . . What all else did you leave out. You left that out of your statement."). JA 25-26.

Concerning the Motive for the Slaying: In the 74-page transcript, Cook gave a different motive for the killing than he had given in his April statement or later gave at trial. The transcript discloses Cook saying on at least two occasions that Banks killed Richard Whitehead because Banks wanted to steal Whitehead's car. JA 8-9. According to this version of the murder-motive information, Cook asked Banks why Banks shot the victim, and Banks said "[U]h I don't know man I wanted his car man." JA 9. Yet, Cook had told the police in his April statement that Banks said he killed Whitehead "for the hell of it." JA 447. Once more, McDaniel noted this significant inconsistency and set about reconciling

Cook's stories. JA 28. McDaniel read Cook the relevant portion of his April statement and said, "You realize what I just read you is different that [sic] what you told me before?" JA 28. Cook responded affirmatively. JA 28. After correcting several other parts of the statement, however, Cook maintained, once again, that Banks killed Whitehead for his car and he said nothing further in the transcript about Banks' killing Whitehead "for the hell of it." JA 28. Then, at trial Cook-forewarned by McDaniel's concern to avoid inconsistencies-testified more or less consistently with his April statement that Banks told him Banks decided to kill Whitehead for the hell of it. 9R 2295.[35]

The prosecutors were acutely aware that successful impeachment of Cook would have dismantled their case against Banks. Defense counsel's efforts to impeach Cook were crippled by the prosecution's suppression of the multiple inconsistent statements in the 74-page transcript. There can be no doubt, as the prosecutors contemporaneously

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[35] Other significant discrepancies in Cook's statements, which the prosecutors called to his attention in the 74-page transcript, included: Cook's failure to mention in April that Whitehead and Banks had been accompanied by Whitehead's date ("[T]his is by far the most important part of your statement . . . And you were supposed to put down every detail, and you didn't do that, you left out something real important about the fact that there was a girl with him. That's not even in your statement at all."), JA 28; Cook's inability to report accurately how many times the victim had been shot, JA 29; his failure to report in April that he had told his wife about Banks' confession, JA 29; his failure to mention that Banks phoned home while staying with the Cooks, and his failure to include in his April statement that Banks had later phoned Cook requesting that Cook mail Banks his gun ("[Y]our statement doesn't say anything about Delma calling you on Thursday, or he called you twice before the police came to your door. He called once and talked to you and once called and talked to Ida. You didn't put anything in your statement about that . . . You didn't think it was important to put in there that Delma called you and wanted you to mail him his pistol back?"), JA 30-31.

recognized, that turning that transcript over to the defense was likely to affect the outcome of Banks' trial. So they did not turn it over.

CONCLUSION

The decision of the Fifth Circuit should be reversed.

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DELMA BANKS, JR.,

Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erroneously applied a procedural bar to Banks's unexhausted claim that the prosecution suppressed material and favorable impeachment evidence during the penalty phase of trial and whether the Fifth Circuit erred in alternatively holding that the evidence was immaterial to Banks's death sentence;

2. Whether the Fifth Circuit misapplied *Strickland v. Washington,* 466 U.S. 668 (1984), and *Williams v. Taylor,* 529 U.S. 362 (2000), to Banks's claim of ineffective assistance of counsel during the punishment phase of trial when it found no prejudice; and

3. Whether the Fifth Circuit violated *Harris v. Nelson,* 394 U.S. 286 (1969), and *Withrow v. Williams,* 507 U.S. 680 (1993), by holding that FED R. CIV. P. 15(b) does not apply to habeas corpus proceedings because "evidentiary hearings" are not sufficiently similar to "civil trials."

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BRIEF OF RESPONDENT

This Court should affirm the Fifth Circuit's decision because Petitioner Delma Banks, Jr. ("Banks")[1] deprived the Texas courts of an opportunity to adjudicate his *Brady* and *Strickland* claims[2] based on the evidence later presented in federal court. Banks negligently failed to inquire into the paid informant status of State's witness Robert Farr or to present his allegations of child abuse and recanted punishment phase testimony despite multiple evidentiary hearings and ample resources. Instead, Banks bypassed the state courts and thereby defaulted his claims and supporting evidence. In any event, Banks does not demonstrate the materiality or prejudice required to obtain habeas relief under *Brady* or *Strickland*. Moreover, the lower courts correctly denied a certificate of appealability ("COA") concerning his FED. R. CIV. P. 15(b) claim because it is not debatable that a habeas claim may not be tried by implied consent. Nor does Banks show that the claim was actually tried by express or implied consent, or that the underlying *Brady* issue is meritorious.

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[1] Respondent Doug Dretke will be referred to herein as "the Director."

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals accurately summarized the evidence of Banks's guilt in its opinion on direct appeal:

> The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash[, Texas] on the morning of April 15, 1980. [Whitehead] had been shot three times, twice in the head and once in the upper back. One shot had been fired at a maximum distance of eighteen to twenty-four inches. Near the scene several empty beer cans and two spent shell casings were found.
>
> Patricia Hicks testified that she was a friend of [Whitehead] and that she was with [him] during the evening of April 11, 1980. Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a black vinyl top, and red hood. During the course of the evening the pair were joined by [Banks] and at his suggestion beer was purchased. The three went to the park near Nash and drank beer. [Banks]'s residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home.
>
> Patty Bungardt testified that [Banks] and [Whitehead] visited her at her house around 11:30 p.m. on April 11[th]. They stayed for approximately ten to fifteen minutes.
>
> Mike Fisher testified that he lived about one hundred yards from the park in Nash. At approximately 4:00 a.m. on April 12[th], he heard two gun shots.

> Charles Cook testified that he met [Banks] on the morning of April 12[th] in Dallas. [Banks] was driving a vehicle which had the same description as [Whitehead]'s. Cook and his wife befriended [Banks] and allowed him to stay with them at Cook's grandfather's home. Cook had noticed a sprinkle of blood on [Banks]'s pants and asked [Banks] about it. [Banks] told him that he had shot a white boy. Later that evening [Banks] told Cook that he had killed someone. [Banks] told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. [Banks] decided to kill the person for the hell of it and take his automobile to Dallas. Cook eventually obtained a pistol and the automobile from [Banks]. The pistol was later identified through ballistic testing as the murder weapon. [Banks] later returned to Texarkana by bus. Cook sold the pistol to his neighbor and took the automobile to West Dallas and left it. It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones.
>
> Cook's wife and sister testified that they saw [Banks] driving a green Mustang on April 12[th]. Cook's grandfather stated that [Banks] stayed at his house for a night or two. Cook's neighbor, Jones, also testified that he met [Banks] during the same time. [Banks] told him he had had a little misunderstanding with someone and had broken his jaw or "something like that." [Banks] asked Jones "did I want to buy any iron, whatever, to make it back to Texarkana."
>
> After [Whitehead]'s body was found [Banks] was placed under surveillance by law enforcement officers. On April 23[rd] or 24[th] they observed [Banks], Marcus Jefferson, and Robert Farr,

> drive together from Texarkana to Dallas. [Banks] was driving the vehicle and after a few stops he eventually went to where Cook resided. The officers watched [Banks] leave the automobile, walk to the front door and then return to the automobile carrying an object. Jefferson and Farr testified that when [Banks] returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun.

Banks v. State, 643 S.W.2d 129, 131-32 (Tex. Crim. App. 1982). On September 30, 1980, Banks was convicted of murder during the course of a robbery, a capital offense. *Id.* at 131; Tr 85-93.[3]

II. Facts Relating to Punishment

During the punishment phase of trial, Banks's brother-in-law Vetrano Jefferson testified that he fought with Banks shortly before Whitehead's murder. JA:104.[4] During that incident, Banks pistol-whipped Jefferson in the face and threatened to kill him. JA:105. Farr took the stand again and explained that when he, Marcus Jefferson, and Banks traveled to Dallas to retrieve Banks's gun, they did so in order to commit some robberies. JA:107-09.

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[3] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, followed by page numbers. "SF" refers to the statement of facts – the transcribed trial proceedings – preceded by volume number and followed by page numbers. "FR" refers to the federal record on appeal, preceded by volume number and followed by page numbers.

[4] "JA" refers to the joint appendix, followed by page numbers. "PA" refers to the appendices to Banks's petition for writ of certiorari, followed by a letter designation and page numbers. "JL" refers to the joint lodging material, followed by page numbers.

The defense then called several witnesses – Banks's parents, two pastors, a family friend, a former teacher, and a former employer – to testify that Banks was a good, respectful, religious young man who should not be sentenced to death. JA:113-14, 137-39; 10 SF 2514-32, 2563-65, 2573-76. An Arkansas police officer, Gary Owen, testified that Farr was a drug addict who worked as a police informant. JA:9-31. In Owen's opinion, Farr was neither truthful nor reliable, and Owen had ceased to use him as an informant. JA:130-31. Finally, Banks testified that Farr planned to commit robberies himself, although it was Banks's idea to retrieve the murder weapon in order to facilitate Farr's scheme. JA:134-37. On cross-examination, Banks admitted that he had pistol-whipped Jefferson and threatened to kill him. JA:136.

At the conclusion of the sentencing phase on October 1, 1980, Banks was sentenced to death. Tr 109-10.

III. Direct Appeal and Postconviction Proceedings

Banks's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari review. *Banks v. State,* 643 S.W.2d at 135, *cert. denied,* 464 U.S. 904 (1983). In 1983 and 1984, Banks filed the first two of five state habeas applications challenging his conviction and death sentence. After evidentiary hearings, the Court of Criminal Appeals denied relief based upon the trial court's findings of fact and conclusions of law. *Ex parte Banks,* No. 13,568-01 (Tex. Crim. App. 1984) (unpublished order); *id.,* 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (order on rehearing).

In 1992, Banks filed his third state habeas application raising, *inter alia, Brady* claims concerning a testimonial deal with Cook, and Farr's police informant status and an ineffective assistance of counsel claim. JA:150-76, 180. Although the trial court recommended that relief be denied, PA:G1-7, the Court of Criminal Appeals ordered the lower court to conduct an evidentiary hearing to resolve Banks's *Swain* claim.[5] PA:F1-3. In 1993, after holding a four-day evidentiary hearing, the trial court issued further findings of fact and conclusions of law recommending that relief be denied. PA:E1-9. The Court of Criminal Appeals then denied relief based on the trial court's findings and conclusions.[6] PA:D1.

On March 7, 1996, Banks filed a federal habeas petition reasserting his *Brady* and *Strickland* claims. JA:248-57, 259-60. After the federal magistrate judge held an evidentiary hearing over the Director's objection in 1999, the parties submitted proposed findings of fact in which Banks first argued that the State suppressed the transcript of a pretrial interview ("the Cook transcript") which he could have used to impeach Cook's testimony as "coached." JA:369-70, 373-74, 378-91. The magistrate judge then recommended granting the writ based on her conclusions that: (1) the prosecution withheld evidence that Farr was a paid police informant; (2) trial counsel was constitutionally ineffective during punishment proceedings; and

[5] *Swain v. Alabama*, 380 U.S. 202 (1965).

[6] A fourth state habeas application filed by Banks did not substantively challenge his conviction or sentence. *Ex parte Banks*, No. 13,568-04 (Tex. Crim. App. 1993) (unpublished order).

(3) the cumulative effect of these errors rendered Banks's sentencing trial fundamentally unfair. PA:C21-25, 40-44, 54. On August 18, 2000, the district court adopted the magistrate's report with minor modifications and conditionally granted Banks relief from his death sentence. PA:B1-7. However, the court declined to consider the Cook transcript claim or to upset Banks's capital murder conviction. PA:B1-7; JA:421-23. The court also denied a COA. JA:432-33.

The Director subsequently appealed and Banks cross-appealed. The Fifth Circuit reversed, rendered judgment in favor of the Director, and denied a COA as to Banks's cross-appeal claims. PA:A1-78. After the court of appeals denied Banks's petition for rehearing, this Court granted a writ of certiorari on April 21, 2003.[7] *Banks v. Cockrell*, 123 S. Ct. 1784 (2003).

SUMMARY OF THE ARGUMENT

This is a case about federalism. Banks bypassed the state courts with the substance of his *Brady* and *Strickland* claims while he litigated his now defunct *Swain* claim. When Banks was ultimately unable to prove an equal protection violation under *Swain*, he abruptly switched gears and began to develop, for the first time in

[7] On March 4, 2003, Banks filed a fifth state habeas application raising the Cook transcript claim, which was ultimately dismissed as an abuse of the writ. *Ex parte Banks*, No. 13,586-05 (Tex. Crim. App. 2003) (unpublished order). This Court denied certiorari review. *Banks v. Cockrell*, 123 S. Ct. 1810 (2003).

federal court, his current claims of prosecutorial misconduct and ineffective assistance of counsel. As a result, the state courts were never afforded a fair opportunity to adjudicate his *Brady* and *Strickland* claims based on the evidence later presented in federal court. Despite Banks's *post hoc* attempts to justify his failure to adequately present the evidence supporting the instant claims during state postconviction proceedings, he neglects to prove the evidence was not reasonably available or the State prevented him from marshaling the facts and making his case in a procedurally correct manner.

First, Banks did not inquire into the paid informant status of State's witness Farr during trial or collateral proceedings in state court, despite the fact that trial counsel was aware Farr was an informant. Banks not only failed to take advantage of available state court discovery procedures, he neglected to attempt to locate, interview, or examine the witnesses who were available during three state habeas hearings. Further, even assuming Farr would not have spoken with Banks prior to federal habeas proceedings, as Banks dubiously alleges, there is absolutely no proof that Farr's taciturnity was the result of official interference.

Nevertheless, had Farr's paid informant status been revealed to the jury during the punishment phase of trial, there is no reasonable probability that Banks would not have been sentenced to death. Virtually all of Farr's testimony was corroborated by other witnesses, who confirmed that Banks traveled to Dallas soon after the instant murder in order to retrieve his handgun and that he offered it to Farr so he could perpetrate further violent crimes. Banks himself admitted, without reservation, that he was willing to provide Farr the means to commit one or

more armed robberies. Moreover, Farr's testimony was thoroughly impeached when trial counsel proved Farr lied about a variety of subjects and previously served as an informant with a motivation to cooperate with law enforcement. The only remaining, credible portion of Farr's testimony was Banks's willingness to abet a violent felony, a fact that Banks himself confirmed. As a result, even assuming Banks could excuse his procedural default, Farr's paid informant status was immaterial within the meaning of *Brady*.

Second, Banks failed to present his serious allegations of child abuse and recanted testimony to the state courts, although he advances no justification for not developing his underlying ineffective assistance of counsel claim when he had the opportunity to do so. Contrary to Banks's argument, these allegations significantly altered and bolstered the claim raised during state habeas proceedings. In any event, there is no reasonable probability Banks's punishment trial would have resulted in a life sentence had he provided the jury with the questionable evidence he relies upon now. Neither of Banks's psychological experts possesses any reliable basis for concluding that he was abused as a child, and Banks's parents do not admit to such abuse. Similarly, Banks's alleged "life-threatening" skin condition is simply not supported by the evidence. Further, Banks's below-average intelligence is not a persuasive reason to conclude that the jury would have rendered a different verdict. Finally, trial counsel cannot be deemed ineffective for failing to suborn perjury from Jefferson or Banks on the issue of future dangerousness. Consequently, even considering the evidence procedurally defaulted by Banks, the balance of mitigating and

aggravating evidence adduced cannot support a finding of *Strickland* prejudice.

Third, it is not debatable that FED. R. CIV. P. 15(b) does not apply to habeas proceedings insofar as the concept of "implied consent" is inconsistent with the doctrine of exhaustion and the nature of postconviction litigation. Further, even if Rule 15(b) applies, Banks fails to show the Cook transcript claim was tried by express or implied consent. It is also not debatable that there is no reasonable probability the jury would have acquitted Banks had the Cook transcript been disclosed to the defense and used to impeach Cook's trial testimony.

ARGUMENT

I. The Court of Appeals Properly Denied Banks's *Brady* Claim Concerning Farr's Paid Informant Status Because the Claim Is Factually Unexhausted, Procedurally Defaulted And, Alternatively, Without Merit.

Banks initially contends that the prosecution suppressed material impeachment evidence – that Farr was paid $200 to assist police in recovering the murder weapon – in violation of *Brady v. Maryland*. However, the Court should reject this contention because the evidence establishing Farr's paid informant status was unexhausted and procedurally defaulted. Additionally, Banks failed to show cause and prejudice for his failure to present the evidence in a procedurally correct manner. Finally, notwithstanding the procedural bars, Banks's *Brady* claim is without merit because he fails to prove that evidence was suppressed or to demonstrate a reasonable probability that his sentencing

trial would have ended differently had Farr's paid informant status been disclosed.

A. The court of appeals correctly held that Banks failed to diligently develop and present the factual basis of the instant *Brady* claim during state court proceedings and thereby procedurally defaulted the claim.

The Fifth Circuit concluded that the evidence supporting Banks's claim that Farr was a paid informant was never presented to the state habeas court. PA:A20-23. Moreover, Banks did not demonstrate cause and prejudice or a fundamental miscarriage of justice that would excuse his failure to afford the state court a fair opportunity to resolve his constitutional claim. PA:A17-22. As a result, the district court was not entitled to consider Banks's unexhausted evidence, much less grant habeas relief thereupon. PA:A22-23. Nor was the court permitted to hold an evidentiary hearing at which unexhausted evidence could be developed. PA:A17-20. As demonstrated below, the Fifth Circuit's decision should be affirmed in all respects.

It is well settled that habeas relief "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (West 1995); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). The exhaustion doctrine is more than a "procedural hurdle"; it reflects a long-standing policy of comity between state and federal courts in order to provide the state courts "an initial opportunity to pass upon and correct" alleged constitutional violations. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992); *Picard v. Connor*, 404

U.S. 270, 275 (1971). Moreover, "[e]xhaustion means more than notice," and requires a petitioner to fairly present a constitutional claim *and* its supporting factual allegations to a state court before seeking federal habeas relief. *Tamayo-Reyes,* 504 U.S. at 9-10; *Connor,* 404 U.S. at 276. Accordingly, when material, additional evidentiary support that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez v. Hillery,* 474 U.S. 254, 259-60 (1986); *Dowthitt v. Johnson,* 230 F.3d 733, 745-46 (5th Cir. 2000); *Demarest v. Price,* 130 F.3d 922, 936 (10th Cir. 1997); *Aiken v. Spaulding,* 841 F.2d 881, 883 (9th Cir. 1988); *Wise v. Warden, Maryland Penitentiary,* 839 F.2d 1030, 1033 (4th Cir. 1988).

Banks concedes that, in state court, he presented only the conclusory allegation that the State suppressed evidence Farr was a "police informant and Mr. Banks's arrest was a 'set-up.'" JA:180. The only evidentiary support offered for the claim was a hearsay statement alleging that Farr was "well-connected to law enforcement people."[8] JA:195; 2 SHTr 144.[9] Thus, as the lower court correctly

[8] This statement, attributed to Demetra Jefferson, appears in an unsigned affidavit and in an investigator's affidavit. Although this hearsay failed to apprise the state court that Banks was claiming the State suppressed Farr's informant status, paid or not, it also failed to create a fact issue at all. *See Dowthitt,* 230 F.3d at 758 (*unsigned* affidavits or investigator's affidavits presented to state court, in absence of showing *signed* affidavits could not be obtained without discovery order or hearing, do not constitute "due diligence" within meaning of *Williams v. Taylor,* 529 U.S. 420 (2000) ("*Williams II*")).

[9] "SHTr" refers to the transcript of pleadings and documents filed with the court during Banks's third state habeas proceeding, preceded

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held, the additional evidentiary support for Banks's *Brady* claim – introduced for the first time during federal proceedings – is not exhausted. PA:A22. Further, it is undisputed that the claim would be dismissed as an abuse of the writ if it was presented in yet another state habeas application. *See* TEX. CODE CRIM. PROC. art. 11.071 §5(a)(1) (West 2003) (barring subsequent applications unless claim could not have been presented previously). Because the Texas abuse-of-the-writ statute is an independent and adequate state procedural bar, the court of appeals correctly held that the claim and its supporting evidence are undoubtedly defaulted in federal court. PA:A22-23; *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1 (1991); *Nobles v. Johnson,* 127 F.3d 409, 422-23 (5th Cir. 1996).

Similar considerations significantly limit a federal court's ability to allow evidentiary development where, as here, a habeas petitioner failed to develop the claim in state proceedings. *Tamayo-Reyes,* 504 U.S. at 11-12. "[E]ncouraging the full factual development in state court of a claim [of] constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance" and prevents the waste of "scarce judicial resources" where a petitioner "negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9. Thus, a claim raised but not developed in state court is also procedurally defaulted and a federal court is prohibited from granting relief *or* from conducting

by volume (or supplemental volume) number and followed by page numbers.

an evidentiary hearing. *Id.* at 11-12; *see also Williams II,* 529 U.S. at 425-37 (where petitioner fails to diligently develop record in state court, "himself . . . contributing to the absence of a full and fair adjudication," evidentiary hearing is barred). In either instance, only a showing of cause and prejudice or fundamental miscarriage of justice will excuse lack of exhaustion or failure to diligently develop the record in state court.[10] *Coleman,* 501 U.S. at 750.

This Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). A demonstration that "the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard."[11] *Id.* (internal citations and quotations omitted). The question revolves around Banks's conduct: specifically, whether Banks "possessed, or by reasonable means could have obtained, a sufficient basis" to prove the instant claim in state court. *McCleskey v. Zant,* 499 U.S. 467, 498 (1990). In other words, the "petitioner must conduct a reasonable and diligent investigation aimed at including all relevant

[10] As the lower court noted, Banks does not advance a fundamental miscarriage of justice argument for his default. PA:A19-20.

[11] The Court also noted that a violation of the Sixth Amendment right to constitutionally effective counsel would constitute a state-sponsored impediment sufficient to establish cause. *Carrier,* 477 U.S. at 488. However, Banks does not argue that his counsel was constitutionally ineffective for failing to develop the instant claim.

claims and grounds for relief" in the state habeas application. *Id.*

The lower court found that Banks's excuses for not developing or presenting the evidence supporting the instant claim in state court were insufficient to establish cause. First, as Banks concedes, he did not request discovery or investigative assistance from the state court in order to develop the claim. PA:A17-19. Second, Banks obtained an evidentiary hearing on his *Swain* claim, as discussed *supra,* but did not seek further discovery, leave to expand the scope of the hearing to include his paid informant claim, or further supplementation of the record. JA:214-20, 225-26, 229-30; 1st Supp. SHTr 40-46; 2nd Supp. SHTr 5-7. These failures are fatal to Banks's claim because diligence requires, at a minimum, a good faith attempt to develop the facts "in the manner prescribed by state law." *Williams II,* 529 U.S. at 437. Texas law provides that all normal, civil discovery mechanisms – including deposition and hearing – are available to an inmate who presents "controverted, previously unresolved facts which are material to the legality of the applicant's confinement." TEX. CODE CRIM. PROC. art. 11.07 §2(d) (West 1991).

That Banks made no attempt to invoke these procedures or to create a fact issue of any kind indicates that Banks's investigation of the claim was unreasonable and cannot amount to cause as contemplated by *Murray* or *McCleskey.* Banks now suggests that he had "no good-faith basis" to seek discovery and that the state court would have ignored his entreaties had they been made. Yet any belief on Banks's part that such efforts would have been futile does not excuse his failure to attempt to develop the claim in state court. "If what petitioner knows or could discover upon reasonable investigation supports a claim

for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might have supported or strengthened the claim." *McCleskey,* 499 U.S. at 498; *cf. Engle v. Isaac,* 456 U.S. 107, 130 (1982) (futility of presenting claim cannot amount to cause and petitioner "may not bypass the state courts simply because he thinks they will be unsympathetic"). Clearly, Banks's deliberate decision not to request investigative assistance is insufficient cause to excuse his default.[12]

Third, the fact that Farr claimed he would not have revealed his paid informant status to Banks, or anyone else, prior to federal habeas proceedings was immaterial because it was unreasonable for Banks not to attempt to speak with Farr at an earlier date, even if such an attempt would have been unsuccessful. PA:A19, 22. Indeed, there is no doubt "[Banks] *believed* Farr had been a paid informant" during state habeas proceedings. PA:A21-22 (emphasis in original). The transcript of the pre-indictment examining trial reveals that counsel knew the State had used a confidential informant to determine Banks was traveling to Dallas to obtain the murder weapon,[13] and counsel's cross-examination of Farr at trial evidences that

[12] Lack of resources was most certainly not an issue. Banks employed numerous attorneys, investigators, law students, and experts throughout collateral proceeding in this case.

[13] Deputy Willie Huff testified during the May 21, 1980 examining trial that he received information from a confidential informant that Banks was traveling to Dallas to obtain a weapon. JA:15-17. Trial counsel then questioned Huff as to whether the informant was from Texarkana or Dallas. JA:21.

counsel knew Farr was that individual.[14] *See, e.g.,* JA:21-23, 37-38, 109-12. As in *Williams II,* 529 U.S. at 439-40, and *McCleskey,* 499 U.S. at 498-500, the trial transcript put Banks on notice Farr was a police informant. During both phases of trial, counsel repeatedly cross-examined Farr over his relationship with law enforcement, specifically his cooperation with Deputy Huff in retrieving the murder weapon, the fact that he was never charged or convicted with crimes despite his long-term drug abuse, and his informant relationship with Arkansas police officer Gary Owen. JA:35-39, 109-12. Although Farr denied any such involvement, trial counsel proved that Farr was an informant for Owen, and called attention to the fact during closing argument. JA:129-30, 145.

These facts distinguish the present case from *Strickler v. Greene,* where the prosecution represented that all evidence had been turned over pursuant to an open file policy, and the Court determined that defense counsel was entitled to rely on this representation. 527 U.S. 263, 276-78 (1999). Here, the State acknowledged the existence of a confidential informant but refused to divulge his identity and, as noted, the trial record undoubtedly suggests the identity of the informant.[15] *See* JA:21; *cf. Strickler,* 527

[14] Prior to trial, the prosecution promised Banks's attorney all discovery "to which [he] was entitled." 1 SF 13. As explained below, the State disclosed that an informant was used but did not reveal the identity of that informant because Banks was not entitled to such information.

[15] *Strickler* is clearly inapposite here, where the State was not required to automatically disclose Farr's identity as the informant. As the Fifth Circuit recognized in *Gonzales v. Beto,* "[i]t has been observed that identification of the informer may render him useless. Even more persuasive to us is the possibility that it may render him dead." 425

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U.S. at 288 n. 33 (declining to "reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them"). A reasonable attorney would have pursued the issue on these bases alone, whether during trial or on collateral attack.

Moreover, even assuming the truth of Farr's alleged reticence, a witness's refusal to speak with defense attorneys cannot amount to official interference as contemplated by *Carrier,* 477 U.S. at 488. Farr "may have made a personal choice to avoid such contact – a choice that is well within his rights." *Johnson v. Puckett,* 176 F.3d 809, 816 (5th Cir. 1999); *United States v. Troutman,* 814 F.2d 1428, 1453 (10th Cir. 1987); *United States v. Black,* 767 F.2d 1334, 1338 (9th Cir. 1985); *see also United States v. Soape,* 169 F.3d 257, 271 n. 9 (5th Cir. 1999) ("[A] government witness who does not wish to speak to or be interviewed by the defense prior to trial may not be required to do so.") (internal quotation marks omitted); *United States v.*

F.2d 963, 971 (5th Cir. 1970) (footnote omitted). Because of such concerns, disclosure is not automatic under either federal or state law. *See Scher v. United States,* 305 U.S. 251, 254 (1938) (public policy forbids disclosure unless it is essential to the defense); *Roviaro v. United States,* 353 U.S. 53, 62 (1956) (no fixed rule could be formulated as to when an informer's identity must be disclosed; rather, "[t]he problem is one that calls for balancing the public interest in promoting the flow of information against the individual's right to prepare his defense"). Consequently, it was Banks's duty to move for disclosure of otherwise privileged material. Banks's complete failure to seek information regarding the informant prior to trial, and then his complete failure to develop the facts to support his instant claim during any of his three state habeas proceedings, is inexcusable.

Bennett, 928 F.2d 1548, 1554 (11th Cir. 1991) (same). "No right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense." *Kines v. Butterworth,* 669 F.2d 6, 9 (1st Cir. 1981) (citing *United States v. Scott,* 518 F.2d 261, 268 (6th Cir. 1975)); *see also United States v. Bittner,* 728 F.2d 1038, 1041 (8th Cir. 1984) (defendant's right of access is not violated when witness chooses voluntarily not to be interviewed). Banks cites no contrary authority. Additionally, Banks does not prove that he was unable to speak with Farr because he disappeared "at the suggestion of his law-enforcement handlers," and Farr's unsworn declarations unequivocally do not support such a conclusion.[18]

Finally, the court of appeals correctly concluded that "Banks should have at least attempted to interview the investigating officers, such as Deputy Huff, to ascertain Farr's status." PA:A22. Banks argues that he had "no reason to believe" Deputy Huff or trial prosecutor James Elliot would have revealed that Banks was a paid informant prior to the federal evidentiary hearing. However, Banks cannot show diligence by simply alleging that an investigation would have been useless. This argument assumes without any evidentiary support that it would have been futile to question these witnesses – or trial counsel himself – about Farr's status when they testified at the state court evidentiary hearing, or by deposition or

[18] Rather, Farr's declarations indicate that he was told to "stop working for the police because [his] life might be in danger," but do not allege that he was instructed, cajoled, or forced to leave Texarkana in any way. JA:440, 444.

simple interview. *See, e.g.,* 3 SHSF 533, 756; 4 SHSF 877.[17] Consequently, Banks fails to demonstrate cause for his default, and his *Brady* claim concerning Farr was properly denied by the lower court.[18]

B. In any event, the Fifth Circuit properly found that Farr's paid informant status was not "material" within the meaning of *Brady*.

Even if Banks could establish cause for his default, his claim fails on its merits. To establish a *Brady* violation, a habeas petitioner must prove that: (1) the prosecution suppressed evidence; (2) the evidence was favorable; (3) the evidence was material either to guilt or punishment; and (4) the allegedly favorable evidence was not discoverable through due diligence. *Strickler,* 527 U.S. at 281-82; *Brady,* 373 U.S. at 87; *Rector v. Johnson,* 120 F.3d 551, 558 (5th Cir. 1998).[19] Both impeachment evidence and exculpatory

[17] "SHSF" refers to the state habeas statement of facts – the transcribed evidentiary hearing held during Banks's third habeas proceeding – preceded by volume number and followed by page numbers.

[18] Additionally, as demonstrated below, Banks fails to demonstrate "prejudice" sufficient to overcome any procedural default. *See Strickler,* 527 U.S. at 282 (unless non-disclosed materials "were 'material' for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default").

[19] When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation. *Herrera v. Collins*, 954 F.2d 1029, 1032 (5th Cir. 1992), *aff'd*, 506 U.S. 390 (1993). *Brady* applies only to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Despite learning prior to Banks's indictment that

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evidence may give rise to a *Brady* violation. *United States v. Bagley,* 473 U.S. 667, 676 (1985). This Court has explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682; *see also Strickler,* 527 U.S. at 291 (petitioner must show "reasonable *probability*," rather than "reasonable *possibility*," of different result in order to obtain relief under *Brady*) (emphasis in original); *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict of confidence").

The Fifth Circuit properly applied this standard and determined that, even assuming Farr's paid informant status was improperly concealed from the defense,[20] the undisclosed evidence was not of such a character as to undermine confidence in the outcome of Banks's sentencing proceeding.[21] PA:A25-33. The lower court first explained that

the State employed a confidential informant, trial counsel did not investigate further, did not formally request disclosure of the informant's identity or file a motion *in limine* to exclude evidence obtained through the informant, and did not move for a continuance. Nor did postconviction counsel exercise due diligence in locating Farr until federal habeas proceedings began.

[20] Banks never offered any evidence from trial counsel to suggest that Farr's informant status was suppressed, despite the fact that trial counsel provided affidavits and live testimony during state habeas proceedings. Although the court of appeals assumed the evidence was suppressed, the Director maintains that Banks failed to prove that fact in the lower courts.

[21] Banks suggests that the materiality analysis of *Giglio v. United States*, 405 U.S. 150 (1972), should apply. However, as noted by the

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Farr's testimony was adequately corroborated by other witnesses at trial, including Banks himself. PA:A26-27, 32. Additionally, the evidence had only minimal impeachment value in the context of the trial. PA:A27-28, 32-33. The court therefore properly found that Banks's *Brady* claim was without merit. PA:A33.

1. Farr's testimony was adequately corroborated by other witnesses at trial.

As discussed *supra,* Farr testified during both phases of trial that he traveled with Banks and Jefferson to the

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court of appeals, *Giglio* involves a distinct constitutional claim from *Brady* and utilizes a different standard for assessing materiality. PA:A29-30. The lower court also held Banks waived any *Giglio* claim because he did not raise it in either his state or federal habeas petitions, and did not request a COA on the issue. PA:A30-31. The Farr claim as it appeared in Banks's state habeas application alleged only that "the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady* . . . [including] information that would have revealed Farr as a police informant" and, in his federal habeas petition, the claim was worded nearly identically. JA:180, 259-60. The only reference to *Giglio* appears in association with a state habeas claim addressing "the prosecutors' determined concealment of information" and "failure to disclose" concerning Cook. JA:152-54. Banks's federal petition does not even cite *Giglio.* As a result, this Court also lacks jurisdiction to address Banks's putative *Giglio* claim. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962).

Nevertheless, the *Giglio* materiality standard – which embraces the harmless error rule of *Chapman v. California,* 386 U.S. 18 (1967) – was arguably abrogated by this Court's opinion in *Brecht v. Abrahamson,* 507 U.S. 619 (1993). *See Barrientes v. Johnson,* 221 F.3d 741, 756-57 (5th Cir. 2000) (assuming *Brecht* harmless error standard applies to *Giglio* claims raised in federal habeas proceedings) (citing *Gilday v. Callahan,* 59 F.3d 257, 268 (1st Cir. 1995)). Because this is a postconviction proceeding, the Director no longer bears the onus of proving harmlessness of trial error under *Chapman*; rather, it is Banks who must prove harm.

Dallas home of Cook to retrieve Banks's pistol. JA:34-35, 105. Farr recalled that Banks spoke with Cook for several minutes on the porch while Farr and Jefferson waited in the car. JA:34-35, 107. Banks then returned to the car and explained that Cook no longer had his gun but had provided him with a different pistol instead. JA:35, 107-08. During the punishment phase of trial, Farr added additional information about this transaction that was relevant to Banks's future dangerousness. When asked about what they had intended to do with the gun, Farr answered, "I don't know. We were going to pull some robberies on the way back [to Texarkana]." JA:108. He also testified that Banks asked him whether the gun Cook had given him would "do," explaining that Banks asked this question because "the gun that we went after, it was a small type of gun and we needed a small type of gun" in order to conceal it. JA:107-08. Finally, when asked whether he had inquired of Banks what would happen if there was any trouble "during those burglaries," Farr responded that "[Banks] said he would take care of it." JA:109.

The details of this event were largely corroborated by the testimony of several other witnesses. Marcus Jefferson confirmed that he had driven to Dallas with Banks and Farr. 9 SF 2256-57. He recalled that when they got to Dallas, the three of them "just rode around . . . looking for a house." *Id.* at 2257. Jefferson stated that once they located the house, Banks walked up to the porch while he and Farr remained in the car. *Id.* at 2257-58. When Banks returned about five minutes later, he told them that "this Two-two dude gave him another gun. He didn't have [Banks's gun] . . . [Banks] said that Two-two said that some girl had [Banks's] gun, and so Two-two gave him another gun." *Id.* at 2264-65.

Cook also provided testimony during guilt-innocence describing Banks's attempts to retrieve his handgun. Cook stated that he sold Banks's gun to his neighbor and, later that week, Banks called and asked if "I got rid of the car and where was that pistol, and I told him that I got rid of it." JA:54-56. Banks called on a second occasion and stated that he was not far from Cook's house and that he needed to speak with him. JA:57. When Banks arrived, he told Cook that "he needed a pistol and he asked . . . where was his pistol." JA:57.

Finally, Banks himself corroborated much of Farr's testimony when he took the stand during punishment proceedings. Banks recalled that Farr planned to commit "some robberies." JA:134. Although Banks claimed that he did not personally plan to participate in any robbery, he acknowledged that it was his "idea to go get the gun. . . . [s]o [Farr] could pull one." JA:134. On cross-examination, Banks admitted that, in supplying the gun, he was "going to supply [Farr] the means and possible death weapon in an armed robbery case." JA:136-37.

Thus, the record strongly corroborates Farr's testimony regarding Banks's attempt to recover his handgun. Farr, Jefferson, and Banks testified they went to Dallas together, and Farr and Banks both admitted the purpose of the trip was for Banks to retrieve his weapon from Cook. Both Farr and Banks also stated that the gun was to be used for one or more robberies, although the witnesses disagreed about who would commit them. Banks himself admitted it was his idea to retrieve the weapon. Any attempt by the defense to demonstrate that Farr was acting at the behest of police would have done little to undercut the State's case. *Cf. Strickler,* 527 U.S. at 294 (record provided "strong support" for conclusion petitioner

would have been convicted of capital murder and sentenced to death even if eyewitness was severely impeached with *Brady* evidence).

Specifically, even if trial counsel could have proved that Farr fabricated a plan to commit robberies only because he was paid to recover the murder weapon for police, Banks himself was unaware that Farr did not actually intend to commit the robberies. As a result, in the jury's eyes, the damaging evidence was Banks's willing abetment of Farr's commission of a violent crime, *not* Banks's own intent to commit such an act. As in *Strickler,* the jury would likely have reached the same conclusion concerning Banks's culpability for the proposed robbery plan based on the remaining evidence, with or without Farr's testimony.[22] 527 U.S. at 292. Consequently, the identified impeachment value of Farr's paid informant status would not have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435 (footnote omitted).

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[22] Contrary to Banks's suggestion, his future dangerousness did not entirely depend on Farr's testimony. Obviously, Banks's crime revealed his wanton disregard for human life, and the fact that Banks pistol-whipped Vetrano Jefferson, and threatened to kill him only days before Whitehead's murder, was compelling and sufficient to prove future dangerousness. *See Hughes v. Johnson,* 191 F.3d 707, 620-21 (5th Cir. 1999) (evidence sufficient to support future dangerousness even where defendant's criminal history was minimal); *Fierro v. Lynaugh,* 879 F.2d 1276, 1280 (5th Cir. 1989) (same); *cf. Strickler,* 527 U.S. at 292-94 (defendant's guilt did not depend on impeached eyewitness testimony).

2. Any additional impeachment material would have added little to Banks's defense.

Moreover, Farr's paid informant status would have had little impeachment value in the context of Banks's trial given the substantial material already offered to impeach Farr's credibility. In particular, Farr denied during cross-examination that: (1) he informed Deputy Huff that he, Banks, and Jefferson were leaving for Dallas; (2) he attempted to obtain false prescriptions the previous week and had an altercation with a doctor who refused to provide him with one; (3) he was a "snitch" for Arkansas narcotics officer Gary Owen; and (4) his wife had shot him. JA:109-13.

However, the defense presented the testimony of James Kelly, who contradicted Farr's account of events involving the Arkansas physician. Kelly testified that Farr had hired him to take him to Arkansas to get a prescription filled, and recalled that when they reached the hospital, Farr began "fussing" with a doctor over filling the prescription. JA:124. According to Kelly, the doctor then ordered Farr "to get his ass out of there." JA:124. Kelly also testified that, after Farr unsuccessfully attempted to obtain prescription drugs from several other hospitals in Arkansas, he indicated that he was determined to get the drugs before he returned to Texarkana. JA:125-26.

Owen also disputed portions of Farr's testimony. He indicated that he knew Farr from his duties and described Farr as a "doper." JA:130. He also opined that Farr was not a truthful person and that he was unworthy of belief. JA:130. Owen indicated that he used Farr as an informant on two or three occasions, but Farr's information was incorrect and he no longer used him. JA:130-31. Finally,

Owen testified that Farr was shot by his wife and that he was a convicted forger. JA:132. Also, Farr admitted during guilt-innocence that he abused the drug Dilaudid for seven years and had "track marks" on his arm as a result. JA:36. He also acknowledged that he abused heroin and smoked marijuana. JA:36-37.

The Fifth Circuit correctly observed that the defense had successfully impeached Farr's credibility with this evidence. PA:A32-33. Indeed, sufficient impeachment evidence lessens the materiality of *Brady* evidence, and effectively renders it immaterial when it merely furnishes a cumulative or collateral basis on which to impeach a witness whose credibility has already been shown to be questionable. *Conley v. United States,* 323 F.3d 7, 30 (1st Cir. 2003); *Edmond v. Collins,* 8 F.3d 290, 294 (5th Cir. 1993); *United States v. Derr,* 990 F.2d 1330, 1336 (D.C. Cir. 1993); *Brewer v. Nix,* 963 F.2d 1111, 1113 (8th Cir. 1992); *United States v. Rossy,* 953 F.2d 321, 324 (7th Cir. 1992); *United States v. Adams,* 914 F.2d 1404, 1406 (10th Cir. 1990). To the extent Farr's paid informant status had any additional impeachment value, it only contradicted Farr's testimony that he did not assist – or was not motivated to assist – Deputy Huff in his investigation. It would not have further damaged Farr's already compromised credibility or undermined Banks's own admission that he was willing to abet an armed robbery by providing the perpetrator with a weapon. Thus, it does not undermine confidence in the outcome of Banks's sentencing trial. *Strickler,* 527 U.S. at 290. The lower court therefore was correct in its assessment that "Farr's paid informant status, when considered against the other impeachment evidence about him, and the fact that much of his testimony concerning the trip to Dallas to retrieve Banks's pistol was corroborated,

does *not* present a reasonable probability that the jury would have found differently concerning Banks's future dangerousness." PA:A33 (emphasis in original, citation omitted).

II. The Lower Court Correctly Held That Banks's Ineffective Assistance of Counsel Claims Were Partially Unexhausted, Procedurally Defaulted And, Alternatively, Without Merit.

Banks also argues that he was denied constitutionally effective counsel during the punishment phase of trial and that the lower court misapplied *Strickland* and *Williams v. Taylor,* 529 U.S. 362 (2000) (*"Williams I"*), to the prejudice component of his claims. Specifically, Banks complains that counsel was deficient for not presenting mitigating evidence from Banks's parents and a mental health expert, or evidence impeaching Vetrano Jefferson's testimony that Banks pistol-whipped and threatened to kill him.[23] Moreover, Banks contends that there is a reasonable probability he would not have been sentenced to death had this evidence been produced. However, this Court should affirm the decision of the court of appeals because significant portions of the supporting evidence are unexhausted and defaulted. Moreover, Banks again fails to show cause and prejudice for his failure to present the evidence at the

[23] This Court did not grant certiorari on the Jefferson claim, and Banks did not include or discuss the claim in the relevant portion of his petition for writ of certiorari. *See Banks,* 123 S. Ct. 1784 ("Petition for writ of certiorari . . . granted limited to Questions 1, 2, and 3 presented by the petition"); *cf.* Petition at 30-33. The Court's order is binding on Banks and, thus, the issue is improperly raised in his merits brief. *Roberts v. Galen of Virginia, Inc.,* 525 U.S. 249, 253-54 (1999).

proper juncture. Finally, assuming that the unexhausted factual support is not barred, the court below correctly denied Banks's claim on its merits.

A. The court of appeals correctly determined that portions of the evidence supporting Banks's Sixth Amendment claim were not presented to the state court.

The Fifth Circuit held the federal court testimony of Dr. Mark Cunningham, detailing the mitigating evidence that was not investigated or presented at trial, was "a significant expansion of the facts and opinions presented in state court" through the affidavits of Dr. Gregorio Piña and, thus, was unexhausted. PA:A37-39. The court also explained that Jefferson's testimony – recanting his own version of events at trial – was not presented during state habeas proceedings, as required by § 2254(b). PA:A41-42. Additionally, Banks never attempted to demonstrate cause and prejudice. PA:A38, 42. As discussed below, the decision of the court of appeals was entirely correct.

Section 2254 and long-standing federal jurisprudence clearly prohibit habeas relief where a claim or its supporting evidence is not exhausted. *Vasquez,* 474 U.S. at 259-60; *Connor,* 404 U.S. at 275-76. Banks does not advance a cause argument; he instead argues that Cunningham's and Jefferson's testimony *were* exhausted because he offered evidence "comprehending the testimony" Cunningham and Jefferson provided in federal court through Piña and Jefferson's sister, Demetra. *See* n. 8, *supra*. Yet a comparison of Banks's proffers in state court to the evidence presented in federal court does not support this contention.

Piña's affidavits submitted in state court vaguely suggest that Banks was "beaten and terrorized by his alcoholic father," and that on one occasion he was "tied to a tree and whipped."[24] JA:207. Piña also opined that Banks's intelligence was below normal,[25] he suffered from a "hyperallergenic" rash which lowered his self-esteem, and he would not be dangerous if incarcerated. JA:207-11. Cunningham's testimony, on the other hand, described extensive physical and emotional abuse directed at Banks, his mother, and his grandmother by his father and grandfather. For example, Cunningham claimed that: (1) Banks's grandfather was a violent alcoholic who, on more than one occasion, chased Banks's grandmother "up a tree where she remained for hours"; (2) Banks's father was also a violent alcoholic who "chased his wife out of the house," relentlessly beat her, and threatened to harm both her and Banks; (3) Banks's father threw food on the floor and discharged firearms in the house; and (4) Banks's father

[24] At the same time, the state court affidavit of Banks's mother suggests only that her husband "hollered" at her when he was drinking and confirms that Banks suffered from an allergic rash. JA:185-88. Not a single reference to physical abuse, whether directed toward her or Banks himself, appears in her affidavit. Banks's father reported one instance of "harsh discipline," *i.e.*, tying Banks to a tree and whipping him with a leather belt as punishment for bullying and stealing from schoolmates. JA:181. As with Banks's mother's affidavit, Banks's father failed to report any physical abuse to the state court.

[25] Piña administered the revised Wechsler Adult Intelligence Scale to Banks in 1992 and 1993 and obtained full scale IQ scores of 85 and 81, including performance IQ scores of 93 and 95. JA:198-99. A Stanford-Binet Intelligence Scale administered to Banks in 1993 revealed a full scale IQ score of 73. JA:203, 205-06.

beat him "with a belt, strap, horse whip, extension cord, [and] coat hanger."[26] JA:349-52.

There can be no doubt that Cunningham's account of Banks's social history is of an entirely different character than the evidence submitted through Banks's parents and Piña. Initially, the fact that neither of Banks's parents confirmed any of Cunningham's allegations but for the skin rash, the alcoholism, and the single incident of harsh discipline casts great doubt over Cunningham's testimony and illustrates the policy justifications for exhaustion. Additionally, Cunningham indicates that he spoke with Banks, his parents, and three of Banks's sisters, and reviewed medical, school, and prison records in order to formulate his opinions. 6 FR 239-41. Yet, other than the previously discussed affidavits, none of this information was presented to the state court through records, affidavits, or witnesses. Not even Piña claims to have reviewed any particular records or to have received any allegations of abuse beyond his interview with Banks.[27] JA:203-04. Thus, the state court was completely unaware of the

[26] During his own testimony at the federal hearing, Banks's father admitted that, in his "younger days," he had a drinking problem. 6 FR 218-19. ("FR" refers to the federal record on appeal, preceded by volume number and followed by page numbers.) The elder Banks explained that he "used to get drunk every weekend," but that he raised his son "real nice," to be a "good boy." *Id.* at 217-18. Banks's mother again described his eczema and his resultant inferiority complex, and confirmed that her husband had a drinking problem in the past. *Id.* at 227-29. Neither admitted to sustained physical abuse or spousal cruelty at any time during their testimony.

[27] Presumably, Piña reviewed at least Banks's father's state habeas affidavit because he does mention the tree-tying incident discussed therein. JA:207.

serious allegations of abuse leveled in federal court, the sources from which they arose, or the reliability of those sources, and was unable to fully consider Banks's asserted constitutional defect.

Similarly, Jefferson's testimony in federal court – attributing the blame for the pistol-whipping incident to himself, 6 FR 166 – was not presented in state court. Indeed, the only comparable evidence advanced in state court was the *unsigned* affidavit of Jefferson's sister, Demetra, and an investigator's affidavit, claiming that Jefferson started the fight in which Banks pistol-whipped him. JA:194; 2 SHTr 144. Because Jefferson testified that Banks pistol-whipped him without provocation during trial, and Banks himself confirmed it, JA:104-05, 135-36, the credibility of Jefferson's late recantation is extremely questionable. Jefferson's testimony loses even more credibility because he gave a written statement to police, confirming his trial testimony, on the night the pistol-whipping occurred. 6 FR 169-70. Once again, the state court was unable to assess Jefferson's credibility because Banks did not exhaust the issue.

As discussed *supra,* exhaustion is more than a "procedural hurdle" or a notice provision; the policy requires a fair presentation of constitutional claims and supporting facts to the state courts. *Tamayo-Reyes,* 504 U.S. at 9-10; *Connor,* 404 U.S. at 276. Moreover, when additional evidence that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez,* 474 U.S. at 259-60. In the instant case, Cunningham's testimony paints Banks's history as one of extreme violence, while Piña and Banks's parents focus on skin rashes, low self-esteem, and below average intelligence. Moreover, Jefferson's credibility is crucial to

his testimony because he testified to an inconsistent story at trial.

While Banks alleges that Cunningham and Jefferson were merely different witnesses, the record clearly shows that their respective statements were fundamentally different from the evidence submitted in state court. In essence, Banks completely bypassed the state courts, denying them a fair opportunity to apply *Strickland* to his allegations of child abuse, and denying the trier of fact a chance to judge Jefferson's credibility. *Connor,* 404 U.S. at 276-77; *see also Tamayo-Reyes,* 504 U.S. at 9 ("The state court is the appropriate forum for the resolution of factual issues in the first instance"); *Williams II,* 529 U.S. at 437 ("For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error"). As a result, the evidence is unexhausted and defaulted based on the independent and adequate state procedural bar discussed *supra.*[28] *Coleman,* 501 U.S. at 735 n. 1; *Nobles,* 127 F.3d at 422-23.

B. Nevertheless, Banks's ineffective assistance of counsel claim is without merit.

In order to establish a Sixth Amendment ineffective assistance of counsel violation, Banks must affirmatively prove that: (1) in light of all the circumstances as they

[28] Additionally, Banks makes no attempt to prove – in this Court or below – cause and prejudice or a fundamental miscarriage of justice, and such arguments are waived. *Beck,* 369 U.S. at 550-54.

appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.,* counsel's performance was deficient under "prevailing professional norms"; and (2) the resultant prejudice was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Bell v. Cone,* 535 U.S. 685, 695 (2002); *Strickland,* 466 U.S. at 687-88, 690. The failure to prove either element is fatal to the claim. *Cone,* 535 U.S. at 695; *Strickland,* 466 U.S. at 697.

In applying the deficiency prong, judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight" and to "evaluate the conduct from counsel's perspective at the time." *Wiggins v. Smith,* 123 S. Ct. 2527, 2536 (2003); *Strickland,* 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Cone,* 535 U.S. at 698; *Strickland,* 466 U.S. at 689. To prove prejudice, Banks must show a reasonable probability that, but for counsel's assumed deficiencies during punishment, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Wiggins,* 123 S. Ct. at 2542; *Strickland,* 466 U.S. at 694-95. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Woodford v. Visciotti,* 537 U.S. 19, 23 (2002); *Strickland,* 466 U.S. at 694. However, "it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding." *Williams I,* 529 U.S. at 394; *Strickland,* 466 U.S. at 693. Because Banks cannot establish both elements of *Strickland,* his ineffective assistance of counsel claim should be denied.

1. The mitigating evidence – exhausted and unexhausted – produced by Banks during postconviction proceedings was insufficient to establish prejudice.

Initially, the court of appeals assumed that trial counsel's representation was deficient, PA:A36, 39, but held Banks was not prejudiced by counsel's performance during the punishment phase of trial with regard to mitigating evidence. First, the court noted that the only exhausted evidence supporting Banks's claim that trial counsel should have obtained expert assistance were Piña's affidavits. PA:A36-38. As discussed above, these affidavits contained only vague allegations of abuse. JA:207. Second, the court considered the claim that trial counsel was ineffective for failing to prepare Banks's parents to testify about Banks's father's alcoholism, the tree-tying incident, and Banks's skin problems, and concluded that, "in light of the nature of the murder, Banks'[s] intent soon thereafter to retrieve a weapon to be used in future armed robberies, and Banks'[s] continued denial during the penalty phase that he committed the murder, there is not a reasonable probability that this evidence would have changed the outcome of the penalty phase." PA:A39-40.

The lower court's prejudice determination should be affirmed. As a threshold issue, Piña's abuse allegations – other than the single instance of discipline – are not supported by the evidence because Banks's parents did not

confirm them by affidavit or otherwise.[29] *See* n. 24, 26, *supra*. As a result, the evidence would have been excluded by the trial court as hearsay. Unlike *Wiggins,* in which the Court noted that state law appeared to allow hearsay evidence to be admitted in sentencing, 123 S. Ct. at 2543, such evidence may be excluded at the punishment phase of a Texas capital murder trial unless it falls within a hearsay exception or bears "persuasive assurances of trustworthiness." *Valle v. State,* 109 S.W.3d 500, 506-07 (Tex. Crim. App. 2003). In this case, such persuasive assurances of trustworthiness are absent because Banks's parents never admitted that any abuse occurred. Moreover, the evidence of Banks's skin problems, low self-esteem, troubled childhood, and below average intelligence is significantly weaker than the evidence rejected by this Court in *Visciotti,* 537 U.S. at 26-27, and by other courts in similar cases.

Moreover, even if Cunningham's defaulted testimony is considered, the analysis remains the same. First, much of Cunningham's testimony concerning physical and emotional abuse could have been successfully excluded as hearsay, as discussed *supra*. 6 FR 286-87. Additionally, the medical records relied upon by Cunningham actually undermine Banks's claims that he suffered from a "life-threatening hyper-allergenic condition" characterized by "ghastly," disfiguring, "chronic bleeding skin and hives," as well as "oozing lesions." The records actually demonstrate that Banks suffered a single dermatological incident due

[29] The suggestion that Banks's parents would have testified to any alleged abuse if they had been prepared to do so at trial is unsupported by the record.

to an allergic reaction to penicillin at the age of eighteen months and that his eczema problem was isolated to infancy. 6 FR 275-77; *see also* Fed. Hearing Exhibit C-6. Further, there are no medical or social services records confirming *any* of the reported physical abuse in the instant case, as there were in *Wiggins* and *Williams I. Cf. Wiggins,* 123 S. Ct. at 2533, 2536-37 (Wiggins was hospitalized for burn to hand and extensive social services records detailed circumstances justifying removal to foster care); *Williams I,* 529 U.S. at 370, 373 & n. 4, 395-96 & n. 19 (juvenile, social services, and prison records indicated extensive abuse). In the absence of such documentation, a habeas petitioner's own fervent interest in obtaining relief from a death sentence demands that a court treat such serious allegations with skepticism.[30] Finally, Cunningham's "risk assessment" testimony would not have been persuasive if presented to the jury.[31]

[30] Where the only evidence of a missing witness's testimony is from the petitioner, as here, claims of ineffective assistance of counsel should be viewed with great caution. *Sayre v. Anderson,* 238 F.3d 631, 636 (5th Cir. 2001); *see also Lincecum v. Collins,* 958 F.2d 1271, 1280 (5th Cir. 1992) ("[W]e are loathe to accept the self-serving statements of habeas counsel as evidence that other persons were willing and able to testify on [petitioner's] behalf").

[31] Cunningham testified extensively about statistical studies demonstrating that violent offenders, when incarcerated, do not pose a significant risk of future dangerousness. 6 FR 243-63, 280-81. However, such evidence is generally insufficient to demonstrate prejudice because prisons are never completely secure, gangs permeate prison society, and inmates are allowed contact with other prisoners, prison personnel, and the outside world. *Id.* at 284-86; *see also, e.g., United States v. Johnson,* No. 02-C-6998, 2003 WL 1193257, *6 (N.D. Ill. 2003) (rejecting risk assessment testimony from Cunningham as proof of prejudice).

Weighing all of the mitigating evidence – defaulted and non-defaulted – against the aggravating evidence produced at trial, there is not a reasonable probability the jury would have concluded that a death sentence was not appropriate.[32] First, Banks's skin condition was clearly not the deadly and crippling disease he makes it out to be, and there is no real evidence of child abuse.[33] Second, Banks's

[32] Banks takes issue with the lower court's sequential analysis of the mitigating evidence and argues that the court did not weigh the totality of the mitigating evidence. However, Banks's assertion is spurious. The court of appeals correctly cited the controlling standard – "whether there is a reasonable probability . . . the sentencer . . . would have concluded the *balance of aggravating and mitigating circumstances* did not warrant death." PA:A34 (quoting *Strickland*, 466 U.S. at 695) (emphasis added). The court then segregated the elements of Banks's claim in order to deal with the complicated exhaustion issues presented and to address the district court's errors, not to compartmentalize the potential impact of the mitigating evidence. To do otherwise would have rendered the court's opinion incomprehensible. Further, with the exception of the Jefferson claim discussed *infra*, the evidence was necessarily intertwined. Piña's affidavits discuss the allegations contained in Banks's parents' testimony; thus, weighing the mitigating evidence as seen by Piña effectively also weighed Banks's parents' accounts. To the extent Banks suggests that the court should have concluded by globally re-weighing its previous weighing of each element of Banks's claim, he is advancing a legal formalism that is overly semantic.

Finally, it must be pointed out that the "weighing" rejected by this Court in *Williams I* as inadequate barely mentioned the mitigating evidence and relied almost exclusively on the overwhelming aggravating evidence. 529 U.S. at 397-98; *cf. Williams v. Warden*, 487 S.E.2d 194, 199-200 (Va. 1997). Here, the court of appeals did no such thing. In fact, it was the district court that improperly "weighed" the evidence by cumulating the prejudicial effect of Banks's *Brady* and *Strickland* claims. PA:A44-47.

[33] Additionally, there was no evidence of sexual abuse in this case as there was in *Wiggins*. 123 S. Ct. at 2533, 2542. Nor were there

(Continued on following page)

low intelligence and his father's alcoholism do not significantly mitigate his conduct, *i.e.*, reduce his moral blameworthiness for his terrible crime, because many individuals do *not* commit capital murder despite sharing similar backgrounds. Third, there is no evidence that Banks was manipulated or controlled by a third party because of his low intelligence, thereby reducing his culpability. Finally, Banks's cold-blooded, execution-style murder of Whitehead in order to steal his vehicle was unnecessary, unprovoked, and completely unjustified. Consequently, the balance of aggravating and mitigating evidence does not suggest a reasonable probability Banks would have been sentenced to life rather than death but for trial counsel's allegedly deficient performance.

2. Banks fails to show deficiency or prejudice with regard to Jefferson's testimony.

As discussed *supra*, Jefferson's trial testimony that Banks was the aggressor in the pistol-whipping incident was confirmed by Banks himself. Banks admitted that he struck Jefferson in the face and threatened to kill him without once attributing the blame for the altercation to Jefferson. JA:136. Further, Jefferson signed a police statement on the night of the pistol-whipping without admitting his purported culpability. 6 FR 169-70. Apparently, Banks argues that trial counsel was ineffective for

"extensive records graphically describing [a] nightmarish childhood" of abuse and neglect. *Williams I*, 529 U.S. at 395 & n. 19.

failing to suborn perjury at trial by convincing not only Jefferson, but Banks himself, to alter their stories.

Banks's theory is contrary to this Court's settled precedent. In *Nix v. Whiteside*, the Court held that trial counsel had no "reasonable professional" duty to present false evidence. 475 U.S. 157, 166-171 (1986). Similarly, "as a matter of law," such a claim cannot establish prejudice under *Strickland*. *Id.* at 175. In any event, the court of appeals correctly denied relief because Banks already "*admitted* he hit Jefferson with a gun and *threatened to kill him.*" PA:A43 (emphasis in original). Thus, the only difference between Jefferson's new version of events and the one presented at trial was that Banks pistol-whipped him "in response" to Jefferson's prior threat to "whoop [Banks's] ass." PA:A43. Because Banks's violent reaction was "far from a proportional response to verbal threats of a non-lethal nature," there was no reasonable probability the jury would not have found Banks to be a future danger. PA:A43-44.

III. The Court of Appeals Correctly Determined That FED. R. CIV. P. 15(b) Does Not Excuse Banks's Failure to Timely Raise His Cook Transcript Claim; in Any Event, the Claim Is Entirely Without Merit.

Banks's final contention is that the lower court erred when it declined to grant a COA to review the district court's refusal to consider the Cook transcript claim first articulated in Banks's proposed findings of fact and

conclusions of law.[34] Specifically, Banks argues that the generic *Brady* allegation contained his initial federal habeas petition provided "adequate notice" of the Cook transcript claim or, alternatively, that the issue was tried by "implied consent" pursuant to Rule 15(b) because the Director did not object to the admission of the Cook transcript during the evidentiary hearing. However, this Court should affirm the lower court's denial of a COA because Banks does not prove that his Rule 15(b) issue – or the underlying substantive claim – is debatable among jurists of reason.[35]

A. The court below properly found that it is not debatable whether the Cook transcript claim was tried by consent as contemplated by Rule 15(b).

The court of appeals held Banks's federal habeas petition "did not state a *Brady* claim concerning the [Cook]

---

[34] A copy of Cook's transcript is provided as a Joint Lodging and is referred to herein as "JA" followed by page numbers.

[35] Banks's right to appeal this issue is governed by the COA requirement of 28 U.S.C. § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). To satisfy this requirement, Banks is obligated to make a substantial showing of the denial of a constitutional right, *i.e.*, "reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have resolved the claims in a different manner, "or that the questions are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (quoting *Slack*, 529 U.S. at 483-84); *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983). Moreover, because the district court denied Banks's claim on procedural grounds, Banks must show both that "jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484 (emphasis added).

transcript, because Banks did not learn of it until *three years after* it was filed." PA:A52 (emphasis in original). This conclusion is not debatable. Banks's petition alleged merely that the prosecution violated *Brady* by suppressing "information that pointed to another suspect in the murder, information that linked prosecution witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Bank'[s] arrest as a 'set-up.'" JA:259-60. Banks's claim concerning Cook explicitly focused on an alleged testimonial deal. JA:259-60.[36]

The Cook transcript was provided to Banks pursuant to a scheduling and discovery order issued three years later. 2 FR 620-21. However, the district court did not recognize the existence of a distinct *Brady* claim based thereupon in its order defining the issues for the evidentiary hearing, JA:340-45, and Banks did not seek to expand the scope of the hearing to include any such allegation even after he acknowledged receipt of the Cook transcript.[37] 3 FR 697-702. Thus, the Director could not have objected on the basis of surprise or expansion of the

[36] Banks's attempt to broaden his original allegation by suggesting that his claims were "by no means limited to" those explicitly asserted is disingenuous. *Cf.* JA:257. The cited catchall provision is followed by a litany of prosecutorial misconduct claims concerning inflammatory and improper argument and cannot reasonably be said to have put the Director on notice that Banks's Cook claim was not limited to allegations of a suppressed testimonial deal. JA:257-59.

[37] In fact, Banks's acknowledgment is a single sentence in a discovery motion which accuses the Director of withholding the evidence Banks was really seeking: confirmation of Farr's paid informant status and Cook's testimonial deal. 3 FR 699-700.

issues, as Banks suggests.[38] Although the Cook transcript was discussed and admitted into evidence at the evidentiary hearing, Banks never indicated that it might support a distinct suppression claim. *Cf.* 6 FR 8. Rather, Banks first raised the Cook transcript claim in his proposed findings of fact and conclusions of law and objections to the magistrate's report and recommendation. JA:369-70, 373-74, 378-80, 397-98. Banks then asserted the claim in a motion to alter or amend, JA:404-05, which the Director opposed, JA:407-11, and the district court refused to consider the issue because it was not properly before the court. JA:421-23.

The court of appeals held Banks should have sought leave of court to amend his petition with the claim as required by Rule 15(a). PA:A52 (citing *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)). The court also noted that Banks cited no authority for applying Rule 15(b), which allows issues not raised by the pleadings to be tried by express or implied consent, to a federal habeas proceeding.[39] PA:A50-52. This ruling is not debatable among jurists of reason. Initially, the record reveals

[38] The Director already objected to discovery and a hearing on the basis of *Tamayo-Reyes* and the exhaustion doctrine. 2 FR 560-82. The Director re-urged the same global objection at the commencement of the hearing itself. 6 FR 9-10.

[39] In fact, contrary to Banks's representations he never mentioned Rule 15(b) or trial by consent to the district court. JA:397-98, 404-05. Rather, he raised his Rule 15(b) argument for the first time in the Fifth Circuit. As a result, the district court never "held these provisions inapplicable" or "categorically barr[ed] the application of Rule 15(b) to habeas corpus." Because the district court was never afforded an opportunity to consider whether Rule 15(b) might apply, the argument is not properly before this Court. *Beck*, 369 U.S. at 550-54.

"neither thought, word, nor deed . . . that could be taken as any sort of consent to the determination of an independent due process claim" based on the Cook transcript. *Withrow v. Williams,* 507 U.S. 680, 696 (1993). Moreover, the implied consent provision of Rule 15(b) is not appropriately applied to federal habeas proceedings.

First, as Banks concedes, the federal rules apply only "to the extent they are not inconsistent with" the more specific habeas rules and statutes. *Hilton v. Braunskill,* 481 U.S. 770, 776 n. 5 (1987); *Browder v. Dir., Dep't of Corr. of Illinois,* 434 U.S. 257, 267-69 (1978); 28 U.S.C. § 2254 Rule 11. Yet an implied consent rule *is* inconsistent with habeas practice. *See, e.g.,* 28 U.S.C. § 2254 Rule 5 (requiring respondent to explicitly answer with statement on exhaustion). The federal courts have consistently refused to honor waivers of legal or factual exhaustion unless expressly articulated or unless lack of exhaustion is not raised. *See, e.g., Thompson v. Wainwright,* 714 F.2d 1495, 1501 (11th Cir. 1983); *Brown v. Estelle,* 701 F.2d 494, 495-96 (5th Cir. 1983). This refusal reflects the important policy considerations of comity and federalism embodied in the exhaustion doctrine. Here, the Director strenuously objected to adjudication of any unexhausted claims and to further factual development of Banks's claims in federal court. Such objections would necessarily include Banks's formulation of a brand new claim based on previously unavailable facts, unless expressly excepted.

Second, while federal habeas proceedings are civil in nature, "the label is gross and inexact," and the federal rules "have very limited application." *Harris v. Nelson,* 394 U.S. 286, 293-95 (1969). Thus, broad discovery rules do not apply unless a heightened pleading standard is satisfied. *Id.* at 295. A jury trial is not available; the rules of evidence are

also relaxed during federal habeas proceedings and affidavits are routinely considered. *Stone v. Powell,* 428 U.S. 465, 493 (1976). Therefore, notwithstanding the *dicta* of *Harris,* 394 U.S. at 294 n. 5, the policy interests embodied in the exhaustion doctrine and the practical differences between civil trials and habeas proceedings dictate that Rule 15(b) should not apply in habeas cases, insofar as Banks wishes to wield the implied consent doctrine against the Director.

Nevertheless, even if implied consent could excuse Banks's failure to timely amend his pleadings, his reliance on *Roell v. Withrow,* 123 S. Ct. 1696 (2003), is misplaced. Here, the Director did not "stand silently" and fail to object when the court indicated that consent had been given. *Id.* at 1700 & n. 1. In fact, neither the magistrate nor the district court believed that the Cook transcript claim was raised at all. Similarly, Banks's citation to a laundry list of non-habeas cases is unhelpful, because implied consent under Rule 15(b) does not exist where the opposing party and the court are not on notice that a new claim is being raised. *Mongrue v. Monsanto Co.,* 249 F.3d 422, 427 (5th Cir. 2001).

> Recognition of whether an unpleaded issue has entered the case at trial depends on whether the evidence supporting the issue is also relevant to another issue in the case. If the evidence overlaps in this fashion, it does not equate to implied consent absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.

Portis v. First Nat. Bank of New Albany, Miss., 34 F.3d 325, 332 (5th Cir. 1994) (internal citations and quotations omitted); *see also, e.g., Douglas v. Owens,* 50 F.3d 1226,

1236 (3d Cir. 1995); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994); *Gamma-10 Plastics v. Am. President Lines*, 32 F.3d 1244, 1256 (8th Cir. 1994); *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992). The Cook transcript was also relevant to Banks's claims that the State suppressed evidence of a testimonial deal and that Cook, not Banks, killed Whitehead. JA:259-60. Thus, because the first clear indication Banks was trying to raise a new issue did not occur until he filed his proposed findings of fact and conclusions of law, there was insufficient notice to support a finding of implied consent, and COA was appropriately denied.

B. Nevertheless, it is not debatable that the Cook transcript is not material to Banks's guilt of capital murder within the meaning of *Brady*.

In order to show that the court of appeals erred in denying a COA as to the Cook transcript claim, Banks must also demonstrate that the merits of the claim are debatable among reasonable jurists. *Slack*, 529 U.S. at 484. The Cook transcript is material only if there is a reasonable probability that, had it been disclosed to the defense at trial, the result of the proceeding would have been different.[40] *Bagley*, 473 U.S. at 682. However, even when the numerous impeachment arguments advanced by Banks are considered in their entirety, the State's case against Banks is not undermined.

[40] Banks continually misrepresents the Cook transcript to contain seventy-four pages, despite the fact that it contains only thirty-eight pages and sixteen duplicates.

First, Cook's original April 1980 statement suggests that Banks asked to take a bath to wash blood from his leg, not that Cook spotted the blood after Banks changed clothes. JA:445-46. The Cook transcript and the trial testimony reveal that Cook saw the blood *before* Banks changed clothes. JA:44-45; JL: 5-6. Thus, only the April statement, which was disclosed at trial, 9 SF 2312, had any impeachment value regarding when and how Cook first knew that Banks had blood on his clothing.[41]

Second, Cook's April statement indicated that he first saw Banks's gun in his jacket on Saturday night but does not reveal when Cook took the pistol from Banks. JA:447. During the pretrial interview, Cook related that he *confiscated* Banks's gun on Sunday night, but that he first spotted the gun on Saturday morning. JL:11-12. When questioned about this inconsistency, Cook admitted that he may have omitted a few details when he wrote out his April statement, and confirmed that he saw the pistol both Saturday morning in the car and Saturday night in Banks's jacket pocket. JL:27-28. As Banks correctly notes, Cook testified at trial that he first noticed the gun

[41] Banks's reference to "the way this statement should read" is taken out of context. During the pretrial interview, the assistant district attorney simulated cross-examination when asking Cook about his original statement, suggesting "they are going to rake you over the coals" about the inconsistencies therein. JL:24. Cook admitted that he wrote his April statement himself (a fact that is reflected by the statement's grammar and syntax), and that at the time he "was a little scared" and "thinking too fast." JL:26. The interviewer's comment taken in context – "your statement doesn't make any sense. What you told me before does make sense" – does not suggest that the State was attempting to change Cook's testimony. JL:24. It only indicates that the interviewer was responsibly trying to determine which portions of Cook's April statement needed clarification or more detail.

on Saturday night. JA:49. Cook also stated that he took Banks's gun on Sunday night. JA:51 Thus, the only inconsistency between Cook's three accounts is that, in his pretrial interview, he claimed to have seen Banks's gun on Saturday morning. However, this does not impugn the fact that Cook confiscated Banks's gun and that the gun was indeed the murder weapon, and it does not undermine confidence in the jury's guilty verdict.

Third, the inconsistency between Cook's April statement and the pretrial interview concerning what street he abandoned Whitehead's car on and whether he left the keys in the ignition or under the seat is not remotely material. JA:448; JL:12-13, 30. Fourth, both Cook and Bennie Jones testified at trial that Cook sold him Banks's pistol, a tool box, and a set of jumper cables. JA:54-55; 10 SF 2349-50. The Cook transcript is consistent but adds the fact that Banks sold the radio and a case of oil from the car. JL:13-14, 30. It is only the disclosed April statement, which suggests that Cook sold the radio to Jones, JA:448, that is in conflict with the trial testimony. Thus, the transcript has no impeachment value because no one testified at trial that Banks did *not* sell the car's radio, and it cannot be said to be material.

Fifth, while the April statement does not mention the visit to a friend's house on Saturday morning, it does state that between visiting Cook's grandmother and sister, Banks and Cook "went riding to West Dallas to visit a few friends." JA:445. The Cook transcript reveals that Banks actually entered the house of one of Cook's friends and Cook testified at trial that they visited a friend's house. JA:45; JL:5-6, 25-26. There is no material impeachment value to this insignificant distinction. Finally, the April statement discloses that Banks killed Whitehead and took

his car to Dallas "just for the hell of it." JA:447. The transcript states that Banks wanted the car and Cook testified at trial that Banks decided to kill Whitehead "for the hell of it and take his car and come to Dallas." JA:48; JL:8. Once again, there is no real difference between either statement and Cook's trial testimony.[42]

As demonstrated, the Cook transcript contains no significant impeachment material. Moreover, the argument that trial counsel could have suggested to the jury that Cook's testimony was "coached" or "rehearsed" is unavailing. Cook's testimony is entirely consistent with his April statement on all important matters. Further, Cook was already impeached with his criminal record, drug use, and a pending arson charge. JA:59-63. As a result, confronting Cook with minor inconsistencies such as where he left the car keys and when he first saw Banks's gun would not have made a difference in the jury's guilt determination. Indeed, reasonable jurists could not debate that these matters neither undermine confidence in the verdict nor establish a reasonable probability of a different result. Therefore, the court of appeals properly denied a COA.

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[42] Contrary to Banks's innuendo, when the interviewer asked Cook whether he realized his April statement was different than "what you told me before," he was asking about when Cook first saw Banks's pistol and why he did not mention Patricia Hicks earlier. JL:27-28.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

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In The
Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The State argues that two of Mr. Banks' constitutional claims are barred by procedural defaults and nonexhaustion (of various sorts) because Banks did not try early enough or hard enough to uncover the supporting factual materials that the prosecution suppressed, hid, and lied about throughout the state-court stages of his case; and that Banks' third claim should not be entertained because he proved it in federal court partly through the testimony of a second expert witness in addition to the expert he proffered to prove the same claim in the state courts (which refused to hear any witnesses at all). We devote this reply brief primarily to answering these procedural arguments. The opening Brief for Petitioner amply discusses the constitutional merits.

I. State-Court Development Of The Robert Farr Claim Was Impeded By The State's Persistent Misrepresentations And Deceptions, Not Banks' Lack Of Diligence

Our opening brief demonstrates that the prosecutors' deliberate deceptions concerning Farr's informer status prevented Banks' Due Process claims based upon these very deceptions from being litigated in the trial court. The prosecutors not only chose to run the risk of "tacking too close to the wind," *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); they not only failed to correct or disclose Farr's false testimony – which they knew to be false – that Farr had not served as an informer in this case and had not received anything of value from law enforcement; but the prosecutors themselves steered the jury, the judge and Banks' counsel astray by affirmatively assuring them all that Farr had been completely truthful. And, as our opening brief also shows, the prosecution continued to run cover for Farr in state habeas proceedings: when Banks raised the issue of Farr's informer status, the prosecutor did not respond and reveal that status, but rather ignored the claim and made no disclosure. As a result of this "interference by officials," the truth about Farr "was not reasonably available to [Banks'] counsel," *Murray v. Carrier*, 477 U.S. 478, 488

(1986), and Banks cannot be faulted for failing to know and assert the crucial facts before Farr finally elected – nearly a year after the conclusion of state proceedings – to reveal to Banks' lawyers his paid informant status and his misleading and untruthful testimony. *See also, e.g., [Michael] Williams v. Taylor*, 529 U.S. 420, 435 (2000); *Strickler v. Greene*, 527 U.S. 263, 284 (1999)(when trial counsel rely upon the reasonable expectation that the prosecution will obey its duty to disclose impeachment material, state habeas counsel may properly do the same).

The State's contrary contention that the facts necessary to establish the Farr claim were available during state-court proceedings rests on assertions unsupported by the record.

A. The trial record shows that Banks was tricked into the belief that Farr had no relationship to law enforcement

The State disclaims any responsibility for impeding Banks' efforts to learn of Farr's paid-informer status. Rather, it says, Banks never inquired at trial about Farr's status. SB 8. This is untrue. Banks sought repeatedly to learn the identity of the State's informer, first from Deputy Huff at a pretrial hearing, JA 21-24, and again during trial, when Banks' counsel questioned Farr on this very point. JA 37, 109. Farr denied being a paid informer; and in closing argument, the prosecutor urged the jury to believe Farr. JA 83-84.

The State also suggests that Banks' trial counsel knew Farr was an informer and had acted as such in this case. SB 8. There is no record support for the suggestion.[1] Counsel neither protested nor contested Farr's trial testimony unequivocally

[1]One of the trial prosecutors and its lead investigator testified at the federal hearing. FH Tr. 17-76, 85-90. Neither claimed that Banks' trial counsel, Lynn Cooksey, knew that Farr had served as an informer in Banks' case. The State had Cooksey under subpoena but chose not to call him to testify on this or any other point.

asserting that Farr had *not* served as an informer in Banks' case. At the sentencing hearing, counsel was able to present some evidence to prove a very different point: that Farr had *previously* served as an informant *in another state*. JA 112-13.

Tellingly, the State says little about what the trial record actually shows. It shows that (1) the prosecutors promised before trial to disclose discoverable evidence without litigation; (2) they did not disclose Farr's status;[2] (3) Farr repeatedly denied receiving anything of value from the State; and (4) the prosecutors asserted in closing that Farr was truthful. Thus the State contrived to represent falsely that, whoever the prosecutor's paid informer was, it was *not* Robert Farr.

B. The post-conviction record shows that the prosecution continued the deception, so that Banks remained unable to prove Farr's status and Farr's perjury until state proceedings had concluded

Banks alleged in his 1992 state habeas petition, upon information and belief, that Farr had served as a paid informant and arranged Banks' arrest. JA 180. He made this claim after Charles Cook told the defense, *inter alia*, that Cook had been pressured to testify against Banks, JA 192-93,[3] and another witness said she thought Farr was "well-connected to law enforcement people." JA 195. Trial prosecutor Elliott

[2]The State relies on *Roviaro v. United States*, 353 U.S. 53 (1957), and similar cases to argue that it was not required to disclose Farr's informer status. SB 18. These cases deal with a wholly different issue: when the government is required to reveal the identity of an undercover informer it does *not* call as a trial witness. Once the State elected to call Farr as a witness, it was plainly required to reveal his status and any consideration made to him. *United States v. Bagley*, 473 U.S. 667, 676 (1985). And when Farr proceeded to mislead the jury by denying his status, the prosecutors were required to correct this false testimony. *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957). Instead, they ratified and exploited it.

[3]Cook was reticent to speak to the defense and thereafter refused to do so until July, 1998.

represented the State in the state habeas proceedings; he had first-hand knowledge that Farr had in fact served as a paid informant, 6FH 54; but in answering the petition, Elliott chose to say nothing in response to this allegation he knew to be true.

The State now claims that if Banks' counsel had been diligent, Banks could have obtained and presented evidence of Farr's status during the state post-conviction proceedings, despite Elliott's taciturnity. Specifically, the State faults counsel for not seeking to interview Farr or obtain discovery from Deputy Huff to support the allegations in the state petition. However, Farr was nowhere to be found at that time because, on the advice of his law enforcement contacts, he "retired" as an informer and – having been told by the police that his life was in danger – he moved out of Texas and settled in southern California. JA 444. Like Charles Cook, he was fleeing contact with anybody representing prisoners he had testified against. He became willing to speak to Banks' representatives only long after state proceedings had concluded. *Id.*[4] As for seeking discovery of Farr's status from Deputy Huff, Banks' state post-conviction counsel had no information to justify such discovery.[5] *See* [*Michael*] *Williams v. Taylor*,

[4]The State characterizes Farr's reticence to speak prior to the conclusion of state proceedings as "dubious" and asks the Court not to credit it. SB 8. The Magistrate Judge did credit it, *see* 5FH 4132-33, and there is no reason not to. Farr testified by declaration without objection by the State, and the State was offered but declined the opportunity either to cross-examine him on deposition or to require that he testify in person.

[5]Notably, when Banks initially moved for discovery in federal court prior to filing Farr's declaration, the State successfully urged the Magistrate Judge to deny discovery by arguing (FH 573) that:

> . . . Banks has offered no specific factual allegations tending to show that Farr was in fact a police informant in Banks' case, and that Farr "set up" Banks' arrest. Although Banks claims that Officer Willie Huff testified during a pretrial hearing [footnote omitted] that a confidential informant had advised him that Banks was traveling to Dallas to obtain a weapon, absolutely nothing indicates that this informant was Farr. All Banks has come up with is that Farr had once acted as an informant a couple of times for an Arkansas State Police Officer, Gary Owen, some years prior to Banks' trial [citation and footnote omitted]. Because Banks has failed to allege specific, non-conclusory facts stating a *prima facie* claim for relief, he has not shown good cause for discovery . . . .

And even if Banks had been granted access to the District Attorney's file to hunt for evidence showing that Farr provided paid-informer services in his case, he would have found none. After such discovery was granted in federal habeas, a review of the file showed not one word identifying Farr as the informant in this case. *See* 3FH 699.

[6]Given Huff's adamant refusal to identify his informant during trial hearings, Banks' counsel had every reason to believe that Huff would not speak about such matters unless compelled to do so while testifying under subpoena at a hearing.

[7]*See, e.g.*, [*Michael*] *Williams v. Taylor*; *Strickler v. Greene*; *Kyles v. Whitley*; *Amadeo v. Zant*, 486 U.S. 214, 222, 224 (1988).

529 U.S. 420, 442-43 (2000). The state habeas judge had also served as the trial judge. Like Banks, he had heard Farr repeatedly deny receiving consideration for law-enforcement services in Banks' case, and he had heard the prosecutors specifically vouch for Farr's credibility. Moreover, when Banks sought discovery on his *Swain v. Alabama*, 380 U.S. 202 (1965), and *Brady v. Maryland*, 373 U.S. 83 (1963), claims, as to which he *was* able to proffer supporting evidence, the state judge wholly ignored the motion and never ruled on it. *See Lee v. Kemna*, 534 U.S. 362, 381 (2002). The state judge similarly disregarded Banks' motion for an evidentiary hearing that would have given Banks a forum for subpoenaing witnesses, including Huff.[6]

This Court has consistently permitted federal habeas consideration of claims and evidence not presented to the state courts when their state-court development was thwarted by state interference less egregious than that in the present case.[7] Here the record is clear that the State and its agents successfully plotted to conceal Robert Farr's paid-informer status from Banks and his lawyers throughout the state-court process, both by stonewalling and by affirmative deceit in flagrant violation of Due Process. The State should not now be heard to claim

that the federal courts are powerless to remedy the Due Process violation precisely because its deceit did succeed.

II. The District Court Correctly Upheld Banks' *Strickland* Claim, Finding Prejudice Established By Properly Exhausted Evidence

The State faults the District Court's grant of relief under *Strickland v. Washington*, 466 U.S. 668 (1984), by arguing primarily that certain facts relied upon by Banks to establish prejudice were unexhausted and that Banks' overall showing of prejudice resulting from defense counsel's failure to develop available mitigating evidence is insufficient. Both arguments disregard the record and controlling case law.

A. The substance of the claim was fairly presented to the state courts

Banks pleaded the same comprehensive claim of ineffective assistance of counsel in state court and in federal habeas. In support of his state petition, he requested a hearing and proffered much of the evidence he later presented at the federal hearing. The State urged that the state petition be summarily denied. It made no effort to contest Banks' proffered mitigation evidence but rather argued that trial counsel's performance satisfied Sixth Amendment performance standards. JA 235-39. The state court denied the claim summarily on the latter ground.

A review of Banks' proffers in the state court reveal that they included, root and branch, exactly what he later presented to the federal court. The proffers took the form of affidavits by Dr. Gregorio Pina and by Demetra Jefferson.

1. Dr. Pina's affidavits

The State now argues that Dr. Pina's affidavits only "vaguely suggest" that Banks was physically abused as a child. SB 30. But in fact there is nothing vague about Pina's account of Banks' traumatic experience of child abuse. Dr. Pina

explicitly submitted his affidavits to document Banks' claim that if Banks' trial lawyer, Cooksey, had done "anything to investigate the mental condition of [his] client . . . ," "he would have found that Mr. Banks suffered from a number of problems which could have had a tremendous impact on issues at both stages of the trial." JA 158. Dr. Pina recounted that "Mr. Banks experienced a number of striking traumas as a child, all of which are likely to have had destructive consequences for his emotional and psychological development." JA 207. Among these "striking traumas," Pina listed Banks' being "beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped." JA 207. Dr. Pina's presentation was concise, but – contrary to the State's arguments – its conciseness made it neither unclear nor inconsiderable.[8]

The State's characterization of Pina as simply "opin[ing] that . . . [Banks] suffered from a 'hyperallergenic' rash which lowered his self-esteem," SB 30, is similarly amiss. What Dr. Pina said (under oath) was that Banks' "chronic raw and bleeding skin and hives . . . had *catastrophic* consequences for Mr. Banks' emotional and psychological development," JA 208 (emphasis in original); that Banks' "severe and chronic dermatological illness . . . had severe traumatic and permanent disabling effects in every area of his physical, emotional, cognitive, and psychological development," JA 207; that "Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore," JA 208; and that as a result of "[r]eject[ion] by his peers and others in the community," Mr. Banks "understandably developed an

[8] Banks' mother's affidavit placed additional evidence of his traumatic childhood abuse before the state court. She reported that because of her husband's "terrible drinking problems" throughout the period of Delma's upbringing, there were repeated occasions when his drunken threats of physical violence terrorized the children and required Mrs. Banks and the children to "run away." JA 186-87.

overwhelming need for acceptance; at the same time, the absence of such acceptance created in him an intense survival guilt and low self-esteem, approaching self-hatred." JA 209.

Although the State describes Dr. Pina's analysis of Banks' mental functioning as limited to an opinion that "Banks's intelligence was below normal," Dr. Pina in fact supplied abundant information supporting Banks' claim that his trial lawyer was ineffective in failing to "arrange for his evaluation by a mental health professional, despite the fact that [attorney] Cooksey had to slowly and carefully, and often repeatedly, explain various preliminary stages of court proceedings to Mr. Banks." JA 158. Dr. Pina found that Banks' "present intellectual functioning, as measured by the Stanford-Binet IQ test . . . is in the borderline mentally retarded range (73)," JA 205, and that Banks' short-term memory also fell into "the mentally retarded range," JA 205. Dr. Pina observed that "neurological testing indicates that Mr. Banks suffers from an organic brain impairment." JA 209. Finally, Dr. Pina described how Banks' "borderline mental retardation and learning disability" intersected with Banks' severe, chronic skin disorder, making it more difficult for Banks to understand "his painful and tragic experience." JA 209.

2. Demetra Jefferson's affidavit

Vetrano Jefferson's prosecution testimony at Banks' sentencing hearing depicted Banks as the author of a savage attack on Jefferson, striking Jefferson with a pistol and threatening to kill him. In state habeas, Banks proffered the affidavit of Demetra Jefferson, Vetrano's sister, which provided a very different version of this domestic dispute. Demetra's proffer stated that "Vetrano told Delma Jr. that he [Vetrano] would hit [her] if he wanted to, regardless of whether [she] was pregnant" but "when he [Vetrano] was about to, Delma Jr. pulled a gun out of his pants pocket and hit Vetrano in the face with it, to keep him from hitting [her]." JA 194. The State

asks this Court to disregard that information "[b]ecause Jefferson testified that Banks pistol-whipped him *without provocation* during trial, and Banks himself confirmed it." SB 32 (emphasis added). In fact, neither the testimony of Jefferson nor the testimony of Banks addressed the question of provocation. Both were silent concerning the context of the dispute. JA 105, 135-36. It is precisely that lack of context which would have led reasonable counsel to investigate a question upon which his client's sentence of life or death might turn. The full story, fairly presented in state habeas, and then again in federal habeas, illuminates the Jefferson affair in a way that would have been profoundly helpful to a jury seeking to evaluate Banks' moral culpability. *See* § B.2. *infra* pp. 10-11.

B. Banks' evidence at the federal hearing altered neither the legal claim previously considered by the state court nor its factual basis

A comparison of the evidence proffered before the state court and that introduced at the federal hearing shows no substantial alteration of the claim or its factual nucleus:

1. Dr. Cunningham's testimony

Where Dr. Pina had described the "striking trauma" of Banks being "beaten and terrorized by his alcoholic father," JA at 207, Dr. Cunningham testified to the "climate of physical abuse and emotional terrorization by his father," JA 351, "who was alcoholic, violent and abusive . . . ." JA 350. Dr. Cunningham was able to elaborate in an evidentiary hearing in a way that Dr. Pina could not do in an affidavit. But any additional facts presented in no way affronted the exhaustion requirement because Banks fairly presented the substance of his claim – factually as well as legally – to the state courts. *See Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

Contrary to its current position, the State never made an issue in any evidentiary forum below of the contents of Banks'

factual showing of the mitigation case neglected by his trial counsel. It urged the state post-conviction court to deny the claim without taking evidence. So the state court held no hearing and made no findings; it simply concluded summarily that counsel had provided effective assistance at all phases of the trial. In federal court, the State did not object to Cunningham's testimony on exhaustion grounds; and despite notice of the evidentiary hearing, it chose not to subpoena any witnesses to contest Banks' factual case.

Collectively, the affidavits of Dr. Pina and Dr. Cunningham, bolstered by the affidavits of Banks' mother and father, centered on identical, critical themes of Banks' life: the abuse he endured at the hands of his alcoholic father; the lifelong chronic skin pain and disfigurement he experienced and the crippling humiliation and isolation that produced; and, finally, the powerful combination of borderline intellectual functioning and other serious neurological deficits that impaired his ability to cope with this constellation of traumas.

2. Vetrano Jefferson's testimony

Vetrano Jefferson's testimony was entirely consistent with what Banks had proffered in state habeas – namely, a dramatically different version of the State's single-episode case in aggravation. Taking on the State's transparent strategy of keeping mum about the cause of the fight between Banks and Vetrano Jefferson, Banks alleged in state and federal habeas that reasonably diligent trial counsel would have investigated the immediate context of this domestic dispute and, discovering that Banks had acted to defend his pregnant common-law wife, would have so informed the jury.

Demetra Jefferson's proffer and Vetrano Jefferson's testimony served the self-same end: they provided the precipitating circumstances – the story that was never discovered or told by Banks' trial counsel – of the altercation

which the State put forward as proving Banks' future dangerousness in support of its case for death.[9] Demetra Jefferson and Vetrano Jefferson both made clear that Vetrano had begun the fight and that Banks was acting to defend his common-law wife from her brother's drunken rage. Their identical accounts, first proffered in state court and then proved in federal court, completely undercut the impression that the State labored to create at trial – and that the State now asserts in this Court as fact – namely, that "Jefferson testified that Banks pistol-whipped him *without provocation* during trial, and Banks himself confirmed it," SB 32 (emphasis added). Disabused of that impression, the jury could have considered fairly whether Banks' defense of his pregnant common-law wife established future dangerousness deserving death.

C. The mitigating evidence was sufficient to establish prejudice

The State contends in this Court that the mitigating evidence neglected by Banks' trial counsel is unreliable and insufficient to establish *Strickland* prejudice. Both contentions are faulty.

The State's argument that Dr. Cunningham's testimony is unreliable because it is based on hearsay is specious. Cunningham explained the sources of all of his expert opinion testimony, and the State never once objected to any of it on hearsay grounds. Equally specious is the State's contention that Cunningham's testimony concerning Banks' many traumatic

[9] "We saw Vetrano Jefferson, and he comes in and says on April 7th, he received a scar that I think all of you could see from where you were sitting, on his left cheekbone. He received that scar at the hands of Delma Banks from a pistol-whipping. He further states that when he left the house, that Delma Banks threatened to kill him, and that his sister had to come in and break it up. Delma Banks admits that, unquestionably." JA 140. "The testimony of Vetrano Jefferson . . . is of the utmost significance. Vetrano brought before you the scar on his face, put there by Delma Banks. Vetrano is part of Delma's family. He was pistol-whipped." JA 146.

experiences is unreliable because those traumas were not confirmed by Banks' parents. The State had unlimited opportunity to cross-examine Dr. Cunningham and Banks' parents but made no effort to raise its present quibbles with them. The Magistrate Judge, seeing and hearing their testimony, credited it. 5FH 1111-1113. There is no reason whatsoever for this Court to doubt that credibility assessment.

And had the jury been confronted with Banks' considerable evidence in mitigation – had it heard how Banks' alcoholic father physically abused and terrorized him repeatedly; how his life was defined by the social rejection, humiliation and isolation caused by his oozing, open sores; how he lacked the mental capacity to come to terms with this world of physical and psychological terrorization and trauma – there is a reasonable probability that it would have returned with a different sentence. For, apart from the largely discredited and recanted testimony of Robert Farr and the altercation with Vetrano Jefferson – now cast in a wholly new light by the knowledge of who and what provoked that altercation – virtually nothing remained of the State's case for death beyond the crime itself. It can hardly be supposed that this radical inversion of mitigation and aggravation would have made no difference to a jury.[10]

III. The Charles Cook Claim Was Properly Before the District Court

The State argues that (A) Banks did not articulate a *Brady* claim based on Cook's pretrial rehearsal transcript until after the federal evidentiary hearing, so the State never had adequate

[10]See the discussion of [*Terry*] *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) in our opening brief at pp. 31-33. The State's effort to distinguish *Wiggins* on the ground that official records confirmed Wiggins' mitigating evidence, SB 37, ignores the fact that Wiggins' social service records "contain no mention of [the] sexual abuse" that was a core component of Wiggins's case in mitigation. *Id.* at 2539.

notice that the *Brady* claim which Banks pleaded included this aspect; (B) FRCP 15(b), authorizing trial of unpleaded issues by consent of the parties, is categorically incompatible with habeas corpus practice; and (C) the suppressed Cook transcript contains only insignificant impeachment material. The record refutes the State's position on points (A) and (C); and its point (B) rests upon a faulty premise regarding the pre-AEDPA habeas rules applicable to Banks' case.

A. The record shows that State's counsel understood the Cook *Brady* claim included impeachment evidence in the suppressed rehearsal transcript

The record flatly belies the State's argument that Banks smuggled the rehearsal-transcript nondisclosure claim into his case by articulating it only after the evidentiary hearing. From the time Banks supplemented his discovery request with Cook's affidavit – which asserted, *inter alia*, that Cook's trial testimony was heavily rehearsed and inaccurate – the State's counsel manifestly understood that Banks' pleaded *Brady* claim was a general one and *not* (as the State now asserts) limited to a contention that Cook had testified pursuant to an undisclosed deal. Both parties in the district court had this understanding prior to the evidentiary hearing;[11] both used the hearing to litigate the circumstances of suppression of the Cook rehearsal transcript.

In response to an order asking the parties to identify the issues for evidentiary hearing, Banks replied that he was seeking a hearing on his claim that "the prosecution withheld critical exculpatory and impeachment evidence concerning at least two important state witnesses, Charles Cook and Robert Farr." JA 300. He supported this request with declarations from Cook and four other state witnesses, arguing that the

[11]Indeed, the State's answer to Banks' petition indicates that State's counsel read the petition to allege a general claim of suppression of impeachment evidence, and denied that claim. 1FH 204-05, 207.

evidence proffered in the declarations "leaves little doubt that state misconduct deprived the jury of critical material concerning Mr. Cook and Mr. Farr's credibility." JA 308. Describing the significance of the new evidence for his *Brady* claim as to Cook, Banks asserted that Cook's declaration *both* "puts to rest the issue of whether he [Cook] testified pursuant to an understanding . . ." *and also* "affirms that much of the most prejudicial testimony he offered at trial was not the truth and that much of this testimony was furnished to him by authorities." *Id.*

Thereafter, the Magistrate Judge ordered limited discovery and set forth the issues to be tried at the hearing. The order required the State to disclose chief investigator Huff's entire investigative file as well as portions of the prosecution file concerning, *inter alia*, witness Charles Cook, "including but not limited to . . . preparation notes, interview notes, and all other written or recorded documentation." 2FH 621. The Court further ordered disclosure of the prosecution file "possessing information regarding discussions between Bowie County District Attorney's office and any Dallas County, Texas official regarding Charles Cook and his participation as a witness . . . ." *Id.* This order plainly directed disclosure of material that would be relevant to both a "deal," and other impeachment evidence. Consistent with the discovery order, the court held that one of the claims it would address at a hearing was "whether Petitioner's Fourteenth Amendment rights were violated by the state witholding (*sic*) impeachment evidence concerning two of the state's essential witnesses, Charles Cook and Robert Farr." JA 345.

From the issuance of these orders throughout the hearing, the parties adopted the court's terminology in speaking about the claims to be tried at the hearing. When Banks furnished his witness list for the hearing, he identified witnesses who would testify with regard to "the due process claim involving state

suppression of exculpatory evidence and presentation of evidence that was misleading and inaccurate." 3FH 673. After receiving discovery and obtaining the transcript of Cook's suppressed pretrial statement, Banks filed a motion to compel discovery and requested a copy of the audio tape of the interview. 3FH 697. The State opposed this discovery request as unnecessary and asserted that the text of the transcript revealed that a prosecutor and investigator Huff "were present during the statement and that it was made a few days before the trial." 3FH 726. And in papers filed to obtain discovery for itself, the State sought greater clarification about which defense witnesses would testify as to each issue, saying that Banks "has raised numerous distinct ineffective assistance of counsel claims and *several Brady claims*" (emphasis added). 3FH 729. Both sides indicated that they would use the transcript in their cases concerning the suppression and misrepresentation claims.

At the hearing, trial prosecutor Elliott was questioned extensively by both sides about the circumstances and content of the transcript. At one point, the State's counsel acknowledged that Banks "has made several allegations that – has presented documents making allegations that Mr. Charles Cook was instructed on how to testify in this case[.]" FH Tr. 55.[12] Elliott denied that law enforcement had planted facts in Cook's testimony; this assertion was challenged by Banks with reference to material in the transcript. FH Tr. 664-66. After

[12]Cook's affidavit, proffered during federal habeas, stated that he spoke with Banks' investigator after concluding that "I could no longer conceal that much of my trial testimony was not true. It was a scripted event that was forced upon me by . . . Huff and the trial prosecutors. . . . While at the station [before trial], I gave a statement that was incomplete and inaccurate in numerous respects . . . . Shortly after my incarceration [on pending arson charges], I was taken . . . to the Bowie County jail for the first of several pretrial practice sessions. Huff and the two trial prosecutors were present. They made it very clear that this case was very important, that I would testify as they wanted me to, and that I would spend the rest of my life in prison if I did not. They repeatedly told me how to say things, and insisted repeatedly that I testify about events that were not true." JA 323, 324, 325.

having considered the substance of the transcript – which established beyond dispute that Cook had been extensively prepped for his testimony – Elliott acknowledged that Cook's testimony denying such prepping was not true and should have been corrected. FH Tr. 74.[13]

After the hearing, the parties filed post-hearing briefs, and later, proposed findings of fact and conclusions of law. The post-hearing briefs focused largely upon the issue whether *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), forbade the judge to consider any of the testimony presented at the hearing. In this brief, Banks referred specifically to the transcript as evidence supporting and proving his *Brady* claim regarding Cook. He stated: "Court ordered discovery dislodged from the prosecutor's files a lengthy pretrial statement law enforcement officials extracted from Mr. Cook that had not been previously disclosed to Mr. Banks. It contains a wealth of impeaching information and supports Mr. Cook's hearing testimony that his key trial testimony was coached and inaccurate. This important document was suppressed at trial and throughout later state court proceedings." JA 360. The State never objected to these and other similar arguments[14] as expanding the pleaded *Brady* claim, even after Banks filed proposed findings and conclusions which offered extensive argument on the merits of this claim. JA 373, 378-91.

[13]At the hearing, the transcript was used by the parties only to address the issue whether it contained impeachment material and whether it showed that Cook's testimony was rehearsed and he had been instructed how to testify. Neither party used it to address the separate issue whether Cook testified pursuant to an undisclosed deal.

[14]Later in the same brief he asserted: "We now know that the state suppressed at trial, and withheld from all subsequent state proceedings, a long recorded statement Mr. Cook made to authorities days prior to trial that contains a wealth of impeachment material as well as corroboration of Mr. Cook's present testimony that his trial testimony was coached, much of it was not true, and that his overriding motivation to testify against Mr. Banks was to secure dismissal of the pending Dallas arson charge and habitual offender papers." JA 365.

The State is simply wrong to assert that suppression of the Cook transcript became a claim only after the hearing. Disclosure of the transcript provided important new evidence to prove Banks' pleaded claim. The circumstances leading to its discovery, the dialogue between the court and parties before the hearing, and the prominent treatment given the transcript at the hearing all show that the State knew before the hearing that Banks' *Brady* claim encompassed suppression of the transcript and that the transcript was admissible evidence to prove this claim.

B. FRCP 15(b) is consistent with the relevant pre-AEDPA habeas practice

The State asserts that Rule 15(b) is generally inconsistent with habeas practice because its application would allow habeas petitioners to try unexhausted issues without the respondent's express waiver of exhaustion. In cases governed by AEDPA, this argument would have some force because AEDPA's 28 U.S.C. § 2254(b)(3) forbids a finding that exhaustion has been waived unless the State expressly waives the requirement. However, this provision of AEDPA stands in stark contrast to the pre-AEDPA law allowing federal habeas courts to deem the exhaustion requirement waived through the State's "failure to raise nonexhaustion in the district court," *Granberry v. Greer*, 481 U.S. 129, 130 (1987), "whether inadvertently or otherwise," *id.* at 134. It is of course undisputed that Banks' case is a pre-AEDPA case, *see Lindh v. Murphy*, 521 U.S. 320 (1997); and under pre-AEDPA law, there was absolutely no inconsistency between Rule 15(b) and exhaustion doctrine.[15] Federal courts could apply 15(b) in the usual manner and simultaneously apply the exhaustion rules of *Granberry* by denying relief either on the merits or for nonexhaustion, at the

[15]That is doubtless why this Court's pre-AEDPA cases assumed that Rule 15(b) applies in habeas proceedings, *see Withrow v. Williams*, 507 U.S. 680, 695-96 (1993), and that its application there is "noncontroversial," *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969).

court's discretion. *See Granberry*, 481 U.S. at 136 ("[T]he general rule of exhaustion is not rigid and inflexible . . . the cases in which the nonexhaustion defense is not asserted in the district court may present a wide variety of circumstances which the courts of appeals, drawing on their familiarity with state criminal practice, are able to evaluate individually") (internal quotation marks and citation omitted). Here, the State never actually argues that Banks' *Brady* claim relating to the Cook transcript is unexhausted. Rather, the State argues that, as a general, theoretical matter, Rule 15(b) and exhaustion are incompatible. As *Granberry* makes plain, this abstract, categorical argument is untenable under pre-AEDPA law applicable to Banks' case.

Nor, on Banks' own record, *could* the State tenably argue that either his *Brady* claim relating to the Cook transcript or the evidence supporting that claim is unexhausted. Banks pleaded a Cook-related *Brady* violation in state habeas and requested discovery, JA 152, thereby satisfying the requirements of claim exhaustion. As for evidentiary exhaustion under *Keeney v. Tamayo-Reyes*, 504 U.S. at 9-10, Banks was thwarted by the State's persistent, deliberate concealment of the Cook transcript, which prevented him from relying on it to support his claim in state court. *See* [*Michael*] *Williams v. Taylor*, 529 U.S. at 443-44. Banks thus presents an even clearer case of exhaustion than Michael Williams did. In *Williams*, the Court excused a federal habeas petitioner for neither pleading his claim of juror bias or developing the facts that supported it in the state courts, because the relevant facts were concealed through implicit misrepresentations by the potentially biased juror and the prosecutor during *voir dire*, and Williams' efforts to get at the facts by generalized postconviction requests for discovery and a hearing were stonewalled by the prosecution and rebuffed by the state court. *See id.* at 442-43. Here, Cook explicitly lied on direct examination by the prosecution at trial, falsely denying that he had rehearsed his testimony with law

enforcement officials or discussed it with anyone before trial, JA 63-64; the prosecutor, knowing that this was a lie calculated to conceal impeachment evidence, let the lie go uncorrected, *id.*; Banks nonetheless pleaded a *Brady* claim in state habeas, asserting *inter alia* that the State had withheld impeachment evidence relating to Cook, JA 152; the State stonewalled, and the state habeas court rebuffed Banks' requests for both discovery and an evidentiary hearing on this claim. Banks made every effort Williams made and more to develop his Cook-related *Brady* claim in the state courts, and he was more egregiously hoodwinked by the prosecution and denied "a full and fair hearing"[16] in the state post-conviction process.

C. The impeachment evidence in Cook's rehearsal transcript is material

The State relies upon a single point in arguing that Cook's rehearsal transcript is insufficiently material to warrant relief under *Brady*: it says that the inconsistencies between the transcript and Cook's testimony are insubstantial. *See* SB 46-49.

This is not merely wrong – as we demonstrate at pages 43-50 of our opening brief – but astonishing. One has only to read the 74-page rehearsal transcript through to perceive with unmistakable clarity that the lawyers who prosecuted Delma Banks on behalf of the State of Texas labored long and painstakingly to twist Charles Cook's testimony into the shapes they desired *because* they were convinced that he stood no chance of being believed if he testified as he appeared likely to testify without such twisting. The transcript is clearly material for impeachment purposes because, *inter alia*:

(1) The State's case for capital murder rested largely upon Cook's being viewed as reliable and credible, as the prosecutor told the jury in his opening statement. *See* 9R 2128-29.

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[16] *Keeney*, 504 U.S. at 10.

(2) Suppression of the rehearsal transcript allowed the prosecutors to assure the jury in closing argument that Cook's lie about no rehearsal of his testimony was the truth.

(3) The rehearsal transcript shows:

(a) that Cook's earlier (April) statement to the police – that was disclosed to the defense and which Cook's trial testimony was assiduously tailored to fit – was the product of Cook's fear that he would be charged in this case;

(b) that Cook had been drinking prior to giving the April statement; and,

(c) that the police had fed Cook important information about the crime before Cook's April statement.[17]

(4) And the State also ignores – now, although not when its prosecutors carefully manicured Charles Cook to play the part of their key witness – the many weaknesses of the State's case without Cook.[18] The prosecution had no custodial statement from Banks; it had no witnesses to the crime; it could not tie any proceeds of the crime to Banks. If the jury was not sold on Cook's credibility, it could find no other evidence sufficient to support conviction of capital murder. Cook's rehearsal transcript demonstrates that the prosecutors knew this all too well.

CONCLUSION

The decision of the court below should be reversed.

[17] *See* our opening brief at p. 14.

[18] Additionally, the victim's car was having electrical problems on the evening of April 11 that prevented it from running for very long before dying, and it would then require a jump start. A certified mechanic tstified that given these problems, it was most unlikely that the car could have made a 180-mile journey during the wee hours of the morning without significant repair that was not then available. JA 212-13; 2SH 149.

Respectfully submitted,

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DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WILLIAM G. BROADDUS, W.J. MICHAEL CODY, JOHN R. DUNNE, AND THOMAS P. SULLIVAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1/]

Each of the *amici curiae* has served for a substantial period of time in a federal or state government position responsible exclusively or in large measure for the enforcement of the criminal laws.[2/] We are not accustomed to appearing on the criminal defense side of the Bar. We join this brief, however, united in our conviction that the death penalty has been imposed in this case because of egregious failings by both the prosecution and defense counsel.

We believe that our criminal justice system depends for its fairness and effectiveness on the willingness of prosecutors to follow the fundamental rules of Due Process enunciated by this Court, and we have a strong interest in the competence of defense counsel, both because Due Process requires it and because, as a pragmatic matter, convictions in well tried cases by the prosecutor are jeopardized by defense counsel's ineffectiveness.

1/ This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk.

2/ William G. Broaddus was the Attorney General of Virginia from 1985-86. Before then he was Virginia's Chief Deputy Attorney General and had spent nine years as a county attorney. W. J. Michael Cody was the United States Attorney for the Western District of Tennessee from 1977-1981, and then served as the Attorney General of Tennessee from 1984-1988. John R. Dunn was the Assistant Attorney General for Civil Rights at the U.S. Department of Justice from 1990 to 1993. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as co-chair of the Illinois Governor's Commission on Capital Punishment.

The integrity of the prosecution and defense functions is especially important in capital cases, for obvious reasons. Moreover, today the American judicial system is subject to intense public scrutiny from around the globe. For these reasons, and because we are certain that, at least at the penalty phase of this case, the prosecution through malfeasance and the defense through indifference deprived petitioner of his constitutional rights, we have taken the unusual step of lending our voice to the petitioner in this case.

STATEMENT

1. The Prosecution's Use Of False Testimony

Prosecution witness Robert Farr, who testified against petitioner at both the guilt/innocence phase and the penalty phase of the trial, was paid $200 by Bowie County Deputy Sheriff Willie Huff to act as an informant in gathering evidence against petitioner. Fed. Ev. Hr'g Tr. at 87-89. Yet at trial he falsely denied under oath that he was a paid informant or that he had had any contact with the police during the investigation of the case. Pet. App. A at 5.

The prosecution did nothing to correct that perjurious testimony (which it knew to be false). To the contrary, in closing at the guilt/innocence stage, the prosecution praised Farr's candidness and assured the jury that "[w]e didn't hide anything with regard to any of [our] witnesses." 10R 2449, 2453.

At the penalty phase, to establish petitioner's supposed future dangerousness, the prosecution recalled Farr to the stand. He testified that he and the petitioner had driven to Dallas at petitioner's urging because petitioner planned to commit armed robberies and needed a gun to take care of any trouble that might arise, *i.e.*, to shoot people. Pet. App. A at

6. He repeated his perjurious testimony of the previous day when he again falsely denied having had prior contact with Deputy Huff and that he was cooperating with the prosecution 10R 2503-09.

Rather than correct any of Farr's lies, the prosecution in closing argument at the penalty phase again assured the jury of Farr's truthfulness, saying that he had "been open and honest with you in every way." 10R 2579. The prosecution added that Farr's testimony was "of the utmost significance" to their case for the death penalty because it showed that Banks posed a "danger to friends and strangers, alike." Pet. App. C at 44; 10R 2593. Farr was one of only two witnesses called by the prosecution at the penalty phase, and the Fifth Circuit in its decision below acknowledged that Farr's testimony "was crucial to the State's position on future dangerousness." Pet. App. A at 32.

The prosecution's tolerance of Farr's perjured testimony, and its own false statements to the jury endorsing that testimony, was part of a pattern of misconduct. Prosecution witness Cook, the key prosecution witness at the guilt/innocence phase of the trial, falsely denied under oath that he had not talked to the prosecution in preparation for his testimony. 9R 2314. The prosecution did not correct that testimony (which it knew to be false), but instead vouched for Cook's honesty to the jury, telling the jury that Cook's testimony was completely truthful. 10R 2450. In addition, the prosecutors suppressed a 74-page transcript of Cook's pretrial coaching session with the prosecutors, Pet. App. A at 10, after having assured the trial court and defense counsel that they would voluntarily turn over all discoverable material. *Id.* at 4.

Reversing the district court, the Fifth Circuit ruled that Farr's perjured testimony was immaterial because, even if it had been exposed, there was not a reasonable probability that

any of the jurors would have changed his or her vote for the death penalty. *Id.* at 33.

2. Defense Counsel's Ineffectiveness At The Penalty Phase

Defense counsel Lynn Cooksey did basically nothing to prepare for the penalty phase of the trial. When the guilty verdict came in at around 11 p.m., Cooksey *then* instructed petitioner's mother to identify and arrange for the appearance of witnesses to testify in mitigation when the penalty phase began the next morning. Fed. Ev. Hr'g Tr. at 225. The cursory testimony of the witnesses who appeared at her request shows that Cooksey had done nothing to prepare them, as several of those witnesses confirmed. *Id.* at 216-17, 227, 232-33. Indeed, Cooksey had never before met or spoken to any of them. At one point Cooksey interrupted the penalty phase proceedings for a chambers conference, during which he pointed to a list of possible witnesses and asked petitioner which ones should be called, saying:

> I don't know these people, I don't know any of those people, I don't know how well they know you and how long they have known you. You know that. You know them a lot better than I do. Who on this list do you want me to call? 10R 2536.

Based on Cooksey's failure to prepare those witnesses, as well as his failure to prepare petitioner's parents for their testimony, the Fifth Circuit ruled that Cooksey rendered ineffective assistance of counsel at the penalty phase. Pet. App. A at 39. The court held that Cooksey was also ineffective in failing to interview Vetrano Jefferson, the other of the State's two penalty phase witnesses, *id.* at 41, and in failing to obtain petitioner's "social history and to investigate mitigating psychological evidence." *Id.* at 36.

Notwithstanding Cooksey's trifold ineffectiveness, however, the Fifth Circuit held that his failings were immaterial and reversed the district court's ruling that petitioner had been deprived of his constitutional right to counsel. *Id.* at 39, 41, 42-44

ARGUMENT

We show in Part I below that the prosecution's use of perjured testimony in this case was prejudicial and thus denied petitioner Due Process. In Part II we show that defense counsel's ineffective performance during the penalty phase also was prejudicial, thereby depriving petitioner of his Sixth Amendment right to effective assistance. For either or both of these reasons, petitioner's death sentence should be set aside.

I.

THE PROSECUTION'S USE OF PERJURED TESTIMONY VIOLATED DUE PROCESS

1. Nearly 70 years ago this Court ruled that the prosecutor is the representative of a sovereignty whose interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).[3/] Speaking more particularly that same year in *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (per curiam), the Court held that "the presentation of testimony known to be perjured" is "inconsistent with the rudimentary

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[3/] The sovereignty in *Berger* was the United States, but the concept is apt and the quote has been used in cases involving state prosecutors as well. *E.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995); *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999).

demands of justice" and thus violates Due Process, a term said to embody "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 112.

Over the years the Court has built on and repeatedly cited those decisions as authoritative. Thus, in *Pyle* v. *Kansas*, 317 U.S. 213 (1942), the Court held that allegations that a prosecutor used perjured testimony and suppressed evidence stated a Due Process violation. Fifteen years later, applying "the general principles laid down by this Court in" *Mooney* and *Pyle*, the Court granted a habeas petition to a state prisoner whose conviction was gained through the use of "seriously prejudicial" perjured testimony. *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957).

Alcorta recognized that a prosecutor must correct testimony that he knows is perjured as well as refrain from soliciting false testimony. That principle was reaffirmed in *Napue* v. *Illinois*, 360 U.S. 264 (1959), where a prosecution witness testified falsely that "he had received no promise of consideration in return for his testimony" and the prosecutor "did nothing to correct the witness' false testimony." *Id.* at 265. The Court concluded that a conviction "must fall under the Fourteenth Amendment * * * when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.[4/]

Mooney, *Pyle*, and *Napue* were followed by and formed the basis of the Court's holding in *Giglio* v. *United States*, 405 U.S. 150, 154–55 (1972), that the prosecution's

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[4/] See also *California* v. *Trombetta*, 467 U.S. 479, 485 (1984) (prosecutor has a "constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath").

chief witness's uncorrected false testimony that he had received no promises for prosecutorial leniency in exchange for his testimony violated Due Process and required a new trial.[5/]

2. Here, as recounted above, the prosecution did nothing to correct testimony from witness Farr that the prosecution knew was false – namely, Farr's testimony at the guilt/innocence stage that he was not a paid informant and had not spoken to the police about the case before his testimony, and his testimony at the penalty phase that he had had no contact with Deputy Huff and was not cooperating with the prosecution. See *supra*, at 2. On the contrary, the State sponsored that testimony, albeit after the fact, by affirmatively assuring the jury of its truthfulness both at the

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[5/] The fundamental rules established by and reflected in this string of decisions from the Court are largely mirrored by both Texas law and applicable ethics rules. A prosecutor in Texas "is more than a mere advocate, but a fiduciary to fundamental principles of fairness." *Duggan* v. *State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). See also Tex. Code Crim. Proc. Ann. art. 2.01 (2002) ("It shall be the primary duty of all prosecuting attorneys * * * not to convict, but to see that justice is done."); Tex. Disciplinary Rules Prof'l Conduct R. 3.09 cmt. 1 (2003) ("A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate.").

Similarly, under the Model Rules of Professional Conduct R. 3.8 cmt. (2002), prosecutors are "minister[s] of justice" who must seek convictions only "upon the basis of sufficient evidence." See also ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 3-1.2 cmt. (3d ed. 1993) ("[T]he prosecutor's obligation is to protect the innocent as well as to convict the guilty."); *id.* § 3-5.6(a) ("[a] prosecutor should not knowingly offer false evidence").

guilt/innocence phase, where it commended Farr for his candidness and said that "[w]e didn't hide anything with regard to" Farr's testimony, and again at the penalty phase, when it told the jury that Farr had "been open and honest with you in every way." 10R 2449, 2453, 2579.

3. That deceitful conduct by the prosecution was material and warrants reversal of petitioner's death sentence. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court ruled that, where the prosecution's case includes the knowing use of perjured testimony, *Mooney* and "a series of subsequent cases" had established that reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103.

The Court refined its materiality analysis in *United States* v. *Bagley*, 473 U.S. 667, 676 (1985), where it held that non-disclosed evidence favorable to the accused *other* than perjured testimony is material "only if there is a reasonable probability that * * * the result of the proceeding would have been different" had the evidence been disclosed. *Id.* at 682 (Opinion of Blackmun and O'Connor, JJ.) and 685 (Opinion of White, J., Burger, C.J., and Rehnquist, J.). The *Agurs* standard for the knowing use of false testimony, however, remained unchanged.

The *Agurs* test – whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury – is satisfied here. The prosecution called only two witnesses at the penalty phase, Farr and Vetrano Jefferson. Jefferson was petitioner's common law brother-in-law. He testified that he and petitioner recently had a fight during which petitioner hit him with a gun and threatened to kill him. 10R 2493-94. But petitioner apparently had no prior record (the State offered none in aggravation) and nothing about the homicide in this case marked it one appropriate for the death penalty under Texas

law – namely, one falling into that "small group of narrowly defined and particularly brutal offenses."[6/] In these circumstances it is highly doubtful that Jefferson's testimony about one incident between near family members would have persuaded the jury to return a death sentence (and whether such a sentence on that evidence alone could withstand appellate review).[7/]

Any doubt on this score may be resolved in petitioner's favor by considering the prosecution's view of Farr's testimony at the penalty phase. It told the jury in closing argument that Farr's testimony was "of the utmost significance" to their case for the death penalty because it showed that Banks posed a "danger to friends and strangers, alike." Pet. App. C at 44; 10R 2593. Indeed, even the Fifth Circuit in its decision below acknowledged that Farr's testimony "*was crucial to the State's position on future dangerousness*." Pet. App. A at 32 (emphasis added).

The Fifth Circuit's holding that Farr's perjured testimony was not material is impossible to square with its statement that the testimony was "crucial to the State's position." The holding rested in part on the testimony of a retired Arkansas law enforcement officer that he had used Farr "once or twice" as a paid informant. *Id.* at 28. The Fifth

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[6/] *Jurek* v. *Texas*, 428 U.S. 262, 270 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted). See also *id.* at 279 (Texas law permits the death penalty only in "a narrowly defined group of the most brutal crimes") (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

[7/] See, *e.g.*, *Ellason* v. *State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991) (fight between in-laws "not particularly probative" of whether defendant would commit future acts of violence constituting continuing threat to society).

Circuit ruled that that testimony already impeached Farr, and that evidence that he had lied about being a paid informant in this case would not have materially further discredited him. *Id.* at 32-33. But there is a big difference between the introduction of conflicting testimony from a witness who himself was subject to impeachment[8/] and who could only testify about what had supposedly happened "once or twice" in Arkansas, and an indisputable demonstration that Farr had repeatedly lied under oath about his informant status and cooperation with the police and prosecution *in this very case*.[9/]

The same is true for Farr's now discredited testimony that he and petitioner went to Dallas to get a gun so that petitioner – rather than Farr himself, as petitioner testified – could engage in robberies. Evidence of Farr's perjury and his coziness with the prosecution could have made a profound difference in the jury's view – or in the view of one juror – regarding petitioner's future dangerousness.

The Fifth Circuit also held that petitioner had failed to exhaust his claims regarding Farr and had thus defaulted them under *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992), and that petitioner had not adequately alleged perjury in his federal petition and hence was not entitled to the *Agurs* "reasonable likelihood" standard. Pet. App. A at 19-20, 22, 31-33. Apart

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[8/] On cross-examination by the State, Owen admitted that he was about to go into business with the investigator employed by petitioner's defense counsel. 10R 2560.

[9/] See *Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

from noting that the Fifth Circuit's result rewards prosecutors who deliberately violated their constitutional obligations of disclosure, we leave it to petitioner to explain why, under *Strickler* v. *Greene*, 527 U.S. 263 (1999), argued to but not mentioned by the Fifth Circuit, the State's conduct of concealment (including its purported open file policy) excused petitioner from not raising his Farr claims earlier.

As for the appropriate standard, we believe *Agurs* does apply in this case because the issue of Farr's false testimony was tried with the consent of the parties in the federal court hearing below and was briefed in the post-hearing briefs. Pet App. A at 9-10, 16. Indeed, the district court ruled that at "no time did the State correct Farr's erroneous testimony or announce Farr's paid informant status." *Id.* at 30. But petitioner should prevail even if his claim were to be construed solely as a claim of non-disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963), rather than a claim of knowing use of perjured testimony under the line of cases from *Mooney* to *Giglio* discussed above, with the result that the *Bagley* "reasonable probability of a different result" standard applies rather than *Agur*'s "reasonable likelihood" standard. As we have seen, the testimony from the only other witness at the penalty phase was "not particularly probative" about petitioner's future dangerousness. *Ellason* v. *State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991). Nor do the facts of the crime bring this case within the "small group of narrowly defined and particularly brutal offenses" for which Texas law reserves the death penalty. See pp. 8-9 n.6, *supra*. Thus Farr's testimony "was crucial to the State's position on future dangerousness" Pet. App. A at 32.[10/] We may take the

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[10/] *See Giglio*, 405 U.S. at 154 (reversing for the nondisclosure of an understanding regarding future prosecution of a government witness where "the Government's case depended almost entirely on" that witness' testimony).

prosecution's word for it that his testimony was "of the utmost significance" to the State's case for death. 10R 2593.

Accordingly, had the jury known that Farr was a paid informant cooperating with the prosecution in this case, and had lied about his status under oath, there is a "reasonable probability" that at least one juror would have voted for a different result, as the district court (applying the *Bagley* standard) ruled. Put differently, the disclosure of Farr's perjury "could reasonably be taken to put the whole [penalty phase of the] case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995). Thus petitioner's death sentence should be set aside.

II.

COOKSEY'S INEFFECTIVENESS DURING THE PENALTY PHASE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court established a two-part test to determine when counsel performance violates the Sixth Amendment: first, whether "counsel's representation fell below an objective standard of reasonableness," and second, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. The ultimate question remains "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

In capital cases, courts address these questions with respect to counsel performance at both the guilt phase and at sentencing. See *id.* at 686–87. "[C]ounsel has a duty to make reasonable investigations" into potential mitigation evidence,

"or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. That is because "[t]he sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Romano* v. *Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001).[11/]

So far as the record shows, petitioner's counsel did almost nothing to prepare for the penalty phase in this case, and undertook no investigation whatever into mitigating evidence.

There is no dispute that Cooksey's performance was ineffective in multiple respects. First, as the Fifth Circuit held, he failed to prepare penalty phase witnesses. Pet App. A at 39. As noted above, Cooksey left it to petitioner's mother, with instructions given to her at eleven p.m. when the jury returned its verdict of guilt, to round up character witnesses to testify on petitioner's behalf the next morning. His requested chambers conference with the judge the next day, interrupting his own case, demonstrates that he had made no effort to meet any of his potential witnesses, much less to learn from them how and to prepare them so they might be most helpful to petitioner's case.

The Fifth Circuit also held that Cooksey was ineffective in failing to interview Vetrano Jefferson, the other of the State's two penalty phase witnesses. *Id.* at 41. Had

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11/ See also Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 299, 303 (1983) (the penalty phase "is a trial *for* life in the sense that the defendant's life is at stake, and it is a trial *about* life, because a central issue is the meaning and value of the defendant's life.")

Cooksey done so, he would have learned – and the jury would have learned – that Jefferson while drunk provoked the fight with petitioner by threatening petitioner's sister and then, when petitioner came to her aid, threatened petitioner as well. *Id.* at 13. Instead, Jefferson's testimony left the jury with the false impression that petitioner was the unprovoked, violent aggressor and allowed the prosecution to contend that petitioner was a future danger "to friends and strangers, alike." Pet. App. C at 44; 10R 2593.

Finally, the Fifth Circuit held that Cooksey was further ineffective in that he failed to obtain petitioner's "social history and to investigate mitigating psychological evidence." Pet. App. A at 36. Thus he failed to put on evidence of petitioner's disfiguring allergies, that he was "beaten and terrorized by his alcoholic father," that he had suffered brain damage, and that his psychological profile "predicted that he would prove a 'safe,' nonviolent inmate during his prison incarceration." *Id.* at 37.[12/]

This record shows a complete breakdown of the defense function at the penalty phase of the case. *Amici* have seen their share of bumbling defense counsel, as the Court may imagine. But there can be no conceivable justification for Cooksey's failure to interview Jefferson, or to investigate petitioner's social history and psychological condition.[13/]

[12/] The quotations are from the report of psychologist Dr. Pina, introduced in petitioner's state habeas proceeding. The report by Dr. Cunningham, which the Fifth Circuit ruled was not exhausted, presented even stronger mitigating evidence. Pet. App. A at 37.

[13/] A reasonable decision not to investigate requires a "reasoned strategic judgment" not to look into potential avenues for mitigation. *Wiggins* v. *Smith*, 539 U.S. __, No. 02-311, 2003 U.S. LEXIS 5014, at *29 (June 26, 2003).

And very little in *amici's* collective experience compares to the spectacle of defense counsel in a capital case, having done nothing to inform himself, turning to his young client in the middle of the penalty phase for advice on what witnesses to call.

In our view the Fifth Circuit's holding that Cooksey's dismal performance was not prejudicial cannot possibly be correct. Petitioner had no prior record and nothing about the crime singled it out as particularly brutal. Had Jefferson's testimony about who was the aggressor been revealed as false; had the jury known of petitioner's physical afflictions, the abusive treatment he suffered at the hands of his alcoholic father, and a psychological evaluation that he had suffered brain damage but nonetheless was predicted to be a nonviolent inmate; and had his mother and father, as well as his other character witnesses, been even minimally prepared to describe petitioner's history and character so as to portray him sympathetically, it is simply impossible to conclude that there is not a reasonable probability that at least one juror would have voted against the death penalty.[14/]

This Court's recent decision in *Wiggins* is instructive. Wiggins' counsel's unjustified failure to investigate led him to overlook significant evidence of Wiggins' extraordinarily difficult childhood, and the Court had no difficulty in concluding that, if the jury had learned more about Wiggins' background, "there is a reasonable probability that at least one juror would have struck a different balance" and voted against death. 2003 U.S. LEXIS 5014, at *49.

[14/] The same conclusion holds true even if we exclude Cooksey's failure to interview Jefferson, a claim the Fifth Circuit held was unexhausted as well as immaterial. Pet. App. A at 42.

Wiggins relied heavily on *Williams* v. *Taylor*, 529 U.S. 362 (2000), which also held that counsel's assistance at the penalty phase was constitutionally deficient because he did not adequately search for mitigation evidence. Despite substantial evidence of dangerousness arrayed against Williams, including his extensive record of extremely violent conduct, the Court nonetheless ruled that, had his counsel presented the available mitigation evidence to the jury, it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.[15/]

Here, as in *Wiggins* and *Williams*, petitioner had "the kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 2003 U.S. LEXIS 5014, at *45 (citing *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)). And here, like *Wiggins*, the comparison to *Williams* is highly favorable, for "the State's evidence in

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15/ Many courts of appeals have reached similar results where counsel failed to prepare for penalty phase proceedings. *E.g.*, *Brownlee* v. *Haley*, 306 F.3d 1043, 1068 (11th Cir. 2002) (counsel "failed to investigate or present any evidence of mitigating circumstances to the jury," including "serious psychiatric problems and substantial intellectual limitations"); *Simmons* v. *Luebbers*, 299 F.3d 929, 936–39 (8th Cir. 2002) (counsel failed to introduce evidence of defendant's troubled background); *Marshall* v. *Hendricks*, 307 F.3d 36, 102 (3d Cir. 2002) (counsel "did no preparation or investigation whatsoever for the penalty phase"); *Carter* v. *Bell*, 218 F.3d 581, 594–600 (6th Cir. 2000) (counsel conducted "no investigation to prepare a defense" and failed to find facts regarding defendant's horribly abusive childhood and possible mental illness); *Lockett* v. *Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) (counsel failed to "conduct a minimal investigation of Lockett's possible mitigation evidence," and his performance was therefore, "under *Strickland*, deficient"); *Patrasso* v. *Nelson*, 121 F.3d 297, 304 (7th Cir. 1997) (counsel "made no effort to * * * seek out mitigating factors").

support of the death penalty [is] far weaker than in *Williams*, where [the Court] found prejudice as the result of counsel's failure to investigate and present mitigating evidence." 2003 U.S. LEXIS 5014, at *50. And here, as in *Wiggins*, nothing in petitioner's history contained "the double edge [the Court has] found to justify limited investigations in other cases." 2003 U.S. LEXIS 5014, at *46 (citing *Burger* v. *Kemp*, 483 U.S. 776 (1987), where a psychological report commissioned by defense counsel was potentially devastating to the defendant, and *Darden* v. *Wainwright*, 477 U.S. 168 (1986), where the defendant had been in and out of prison for much of his adult life).

Strickland teaches that, in a Sixth Amendment right to counsel case, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Our collective experience teaches us that the penalty phase proceeding in this case was fundamentally unfair. Cooksey failed petitioner completely through an appalling want of dedication and energy. With his life in the balance, petitioner might as well have been unrepresented for all the effort Cooksey made. On top of that, the prosecution built its case for death on testimony it knew to be perjured. The Fifth Circuit should not have countenanced the fundamental unfairness of this proceeding, and its decision upholding the imposition of the death penalty should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectively submitted,

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July 11, 2003

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(8)

No. 02-8286

JUL 11 2003

In the Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF JOHN J. GIBBONS, TIMOTHY K. LEWIS, WILLIAM S. SESSIONS, HAROLD R. TYLER, JR., HAROLD G. CLARKE, AND JAMES G. EXUM, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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In the Supreme Court of the United States

No. 02-8286

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF JOHN J. GIBBONS, TIMOTHY K. LEWIS, WILLIAM S. SESSIONS, HAROLD R. TYLER, JR., HAROLD G. CLARKE, AND JAMES G. EXUM, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

John J. Gibbons, Timothy K. Lewis, William S. Sessions, Harold R. Tyler, Jr., Harold G. Clarke, and James G. Exum, submit this *amicus curiae* brief in support of the petitioner, Delma Banks Jr.[1/]

1/ This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are former federal and state judges who maintain an active interest in the fair and effective functioning of the criminal justice system.[2/] *Amici* are committed to ensuring that the death penalty is fairly administered and is not procured through prosecutorial misconduct and violations of constitutional guarantees.

The fairness of the capital sentencing process is dependent on the proper fulfillment of the roles of prosecutor

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2/ John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and as a judge of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Harold R. Tyler, Jr. served as a judge for the United States District Court for the Southern District of New York from 1962 to 1975. He was also an Assistant U.S. Attorney for the Southern District of New York from 1953 to 1955, the Assistant U.S. Attorney General, Civil Rights Division, from 1960 to 1961, and the Deputy Attorney General of the United States from 1975 to 1977. Harold G. Clarke served as a justice of the Supreme Court of Georgia from 1979 to 1990, and as Chief Justice of that court from 1990 to 1994. He also served in the Georgia Legislature from 1961 to 1971. James G. Exum served as a justice on the Supreme Court of North Carolina from 1975 to 1986, and was Chief Justice of that court from 1986 to 1994.

and defense counsel. The questions presented in this case concern prosecutorial suppression of evidence and ineffective assistance of counsel – issues that, by their very nature, threaten the ability of the adversarial system to produce just results. The prosecutorial duty to disclose material exculpatory evidence reflects the notion that prosecutors represent the public, which "wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When evidence is wrongfully suppressed, the prosecutor violates his duty to the public and also interferes with defense counsel's ability to serve as an effective advocate. The resulting "gladiatorial" contest, "unmitigated by any prosecutorial obligation for the sake of truth," fails to satisfy the basic demands of justice. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

Similarly, the paramount importance of adequate defense counsel in capital cases cannot be overstated. When a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined. As this Court stated in *Strickland v. Washington*, 466 U.S. 668, 685 (1984):

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

The questions presented by this case are therefore of vital importance to all persons who are committed to ensuring fairness and accuracy in the administration of the death penalty.

SUMMARY OF ARGUMENT

The questions presented in this case directly implicate the integrity of the administration of the death penalty in this country. The prosecutors concealed important impeachment material from the defense. In addition, the district court found, and the court of appeals agreed, that Mr. Banks received ineffective assistance from his lawyer, at least at the penalty phase of his trial. The court of appeals' reasons for reversing the district court's grant of relief, and refusing to issue a certificate of appealability as to grounds rejected by the district court, are inconsistent with prior decisions of this Court.

Moreover, the court of appeals' treatment of these claims poses a significant threat to the fairness of future proceedings. By penalizing petitioner for failing to discover sooner that the prosecution wrongfully withheld evidence, the court effectively insulated the prosecutors' conduct from judicial review and provided an incentive for prosecutors to withhold evidence in the future. Similarly, by requiring petitioner to demonstrate that *each individual piece* of mitigation evidence that was not presented at trial as a result of his lawyer's substandard performance would have yielded a different result at the penalty phase, the court of appeals established an unreasonable standard by which to evaluate ineffective-assistance claims.

Because the constitutional violations at issue in this case undermine the reliability of Mr. Banks's conviction and death sentence, the decision of the court of appeals should be reversed.

ARGUMENT

I. THE CAPITAL PUNISHMENT SYSTEM CANNOT FUNCTION FAIRLY AND EFFECTIVELY UNLESS PROSECUTORS AND DEFENSE COUNSEL PROPERLY PERFORM THEIR ROLES

Two of the most predominant flaws in the death penalty system as currently administered are the persistent failure of prosecutors to disclose exculpatory evidence to the defendant – despite a clear constitutional command that they do so – and the often abysmal representation provided to capital defendants at trial. A study evaluating error rates in capital cases from 1973 to 1995 concluded:

> The most common errors – prompting a majority of reversals at the state post-conviction stage – are (1) egregiously incompetent defense lawyers who didn't even look for – *and demonstrably missed* – important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but suppressed it, again keeping it from the jury.[3/]

Similarly, the report prepared by a "blue ribbon committee" of lawyers, judges, and public officials, established to address "the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death," concluded that the "lack of adequate counsel to represent capital defendants" and the failure of prosecutors to provide the defense with exculpatory evidence are among the most persistent flaws in the death penalty

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3/ James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii (June 12, 2000) (available at http://justice.policy.net/jpreport); *see id.* at 6.

system. *Mandatory Justice: Eighteen Reforms to the Death Penalty*, at ix, 1, 50 (The Constitution Project, 2001).[4/]

Both of these flaws are implicated by this case. Mr. Banks's trial was marred by the apparently deliberate suppression of evidence by the prosecution and the "dismal performance" of Mr. Banks's counsel. These claims go to the very heart of the effective functioning of the capital punishment system. Yet one of these claims – involving the suppression of a pre-trial statement of the State's principal guilt-phase witness – has never been heard by any court. The others were rejected by the court of appeals even though the district court concluded that they substantially undermined the reliability of the jury's decision to impose the death sentence.

The courts are responsible to capital defendants and to the public to identify and correct constitutional errors in capital cases. As the Delaware Supreme Court recently observed, "[w]hile the adoption of the death penalty . . . is a legislative prerogative, the judiciary has a special obligation to ensure that the standards governing its application are applied fairly and dispassionately and, just as important, appear to be so." *Stevenson v. State*, 782 A.2d 249, 260 (Del. 2001). In this case, the court of appeals' decision would allow Mr. Banks's execution to go forward despite

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4/ The Constitution Project, which is based at Georgetown University, "seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education." *Id.* at ix. The project's death penalty initiative was established in May 2000 "to examine our country's present course, and to recommend ways to ensure that fundamental fairness is guaranteed for all." *Id.* Two of the *amici* – John J. Gibbons and William S. Sessions – are members of the Constitution Project death penalty initiative.

uncured constitutional errors in the process through which he was convicted and sentenced. Relief should be granted in order to resolve lingering doubts regarding whether these errors were responsible for the outcome of Mr. Banks's trial.

II. DISCLOSURE OF EXCULPATORY OR IMPEACHMENT EVIDENCE IS ESSENTIAL TO ENSURE FUNDAMENTAL FAIRNESS IN CAPITAL CASES

Under clearly established federal law, a state violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Indeed, a defendant's right to receive from prosecutors exculpatory impeachment material is "a right that the Constitution provides as a part of its basic 'fair trial' guarantee." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

In addition, this Court has long recognized that a prosecutor's "deliberate deception of court and jury by the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). As a result, due process is violated when a prosecutor fails to correct testimony that he knows to be false, even when the falsehood goes only to the witness's credibility. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

These principles illustrate "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In our system, the prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United*

States v. Bagley, 473 U.S. 667, 675 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, the District Attorney's office assured Mr. Banks that there would be no need to litigate discovery disputes. In a letter to Mr. Banks's counsel, the prosecution wrote "[w]e will, without necessity of motions provide you with all discovery to which you are entitled." 1 SR 13.[5/] Despite this representation, the prosecution withheld evidence that would have allowed Mr. Banks to discredit two of the State's most important trial witnesses. The court of appeals wrongly held that Mr. Banks failed to object at the appropriate time to the State's suppression of this evidence and did not realistically consider the impact that the evidence would have had on the jury had it been introduced.

A. The Failure of Mr. Banks's Habeas Petition Specifically to Mention the Suppressed Transcript as One of the Bases for His Stated *Brady* Claim Should Not Preclude Judicial Review of that Claim.

It is undisputed that the State failed to produce in discovery a lengthy transcript of a pre-trial interview of Charles Cook by Bowie County law enforcement officers and prosecutors. The suppressed transcript substantially undermines the reliability of the State's principal guilt-phase witness.[6/]

5/ "SR" refers to the state trial record, preceded by a volume number and followed by a page number. "R" refers to the federal habeas record, preceded by a volume number and followed by a page number. "Fed. Tr." refers to the transcript of the federal evidentiary hearing. "Fed. Ex." refers to the exhibits introduced at the federal evidentiary hearing.

6/ *See generally* Fed. Ex. B-04 (included in Exhibit A to petitioner's Motion to Compel Discovery, dated May 11, 1999, and reprinted in volume 3 of the federal habeas record).

In particular, Mr. Cook testified at trial that he had spoken to no one in preparation for his testimony. 9 SR 2314. The transcript demonstrates that this statement was false, and that Mr. Cook's trial testimony was extensively rehearsed.[7/] Nonetheless, the prosecutors – who were in possession of the transcript at trial – assured the jury that Mr. Cook testified truthfully. 10 SR 2449-50.

In addition, Cook's statements in the transcript differ in several respects from those made in the April 1980 statement he gave to the police, which was produced to the defense. For instance, Cook did not consistently describe the circumstances surrounding Cook's alleged disposal of Banks's gun and the victim's car and other possessions.[8/]

7/ For example, in the September interview, Cook was coached on how to deal at trial with an illogical portion of the statement that he gave to the police in April, in which he said that he noticed blood on Mr. Banks's pants *after* Banks had changed clothes. In the transcript, Assistant District Attorney McDaniel told Cook:

> Your statement is obviously screwed up. And they are going to ask you about it and they are going to rake you over the coals about it because it is screwed up. It doesn't make any sense that he changed clothes and you got back in the car and went riding and then you noticed blood on his pants because if he changed clothes he wouldn't have any blood on his pants. . . . They are going to ask you about it and you are just going to have to explain it. That you [made] a mistake and you got your facts out of sequence.

Fed. Ex. B-04 at 24.

8/ In the April 1980 statement that Cook gave to the police, for example, Cook stated that he abandoned the car

Moreover, the transcript reveals that the police supplied Cook with crucial information regarding the crime, such as the date it occurred and that the victim was "a white boy," before Cook gave his April statement. *See* Fed. Ex. at 19-20.

Mr. Banks presented a *Brady* claim in his federal habeas corpus petition, but obviously was unable to include a specific mention of the Cook transcript because the State had not yet disclosed its existence at the time the petition was filed. Indeed, the State did not produce the transcript until the magistrate judge directly ordered the State to produce documents concerning Charles Cook, including "records of contact . . . , preparation notes, interview notes, and all other written or recorded documentation." 2 R 621. By this time, three years had passed since Mr. Banks filed his habeas petition and nearly *nineteen* years had passed since Mr. Banks's trial. The transcript was introduced at the evidentiary hearing, and Assistant District Attorney Elliot (who was one of the prosecutors at Mr. Banks's trial) confirmed that the prosecution had the transcript before the trial, but did not disclose it to Mr. Banks. Pet. App. A at 10.

The court of appeals rejected Mr. Banks's *Brady* claim regarding the Cook transcript on the ground that Mr. Banks did not mention the transcript in his federal petition,

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on "Canna Drive" and left the keys under the seat. *See Affidavit of Charles E. Cook* at 2 (dated April 24, 1980) (included in Exhibit A to petitioner's Motion to Compel Discovery, dated May 11, 1999, and reprinted in volume 3 of the federal habeas record). In the September transcript, however, Cook said that he left the car on "Town Drive" with the keys in the ignition. Fed. Ex. B-04 at 12-13. At trial, Cook testified that he left the car on "Canada Drive," but did not mention what he did with the keys. 9 SR at 2303. In addition, the transcript itself is internally inconsistent regarding when Cook supposedly disposed of these items. *See* Fed. Ex. B-04 at 13-14.

and did not move to amend his petition under Federal Rule of Civil Procedure 15 once the State disclosed the transcript in 1999. *See* Pet. App. A at 52. Rule 15(b) provides, however, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." As a result, and as the court of appeals recognized, "once issues are presented and argued without objection by opposing counsel, such issues are tried by implied consent of the parties and are treated as if they had been raised in the pleadings." Pet. App. A at 51 (quoting *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 389 (5th Cir. 1984)).

Here, the magistrate judge informed the State in advance that impeachment evidence regarding Cook would be addressed at the evidentiary hearing, and the Cook transcript was admitted into evidence without objection from the State. *See* 3 R 630; Fed. Tr. 64-76; Pet. App. C at 5. Mr. Banks extensively addressed his claim that the suppression of the Cook transcript violated *Brady* in the Proposed Findings of Fact and Conclusions of Law that he submitted before the magistrate judge issued her report and recommendation.[9/] Nevertheless, the court of appeals ruled that the lack of an amendment to the habeas petition precluded consideration of this aspect of the *Brady* claim, stating that "Banks has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." Pet. App. A at 52.

Contrary to the court of appeals' ruling, Rule 15(b) should not be interpreted to apply only when a proceeding

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9/ 4 R at 921, 930-31, 953-671; *see* 5 R 1265. The court of appeals was therefore incorrect in suggesting that the issue was "first raised in [Mr. Banks's] objections to [the magistrate judge's] report and recommendation." Pet. App. A at 52.

labeled "trial" has occurred. Rather, the rule is appropriately applied whenever issues have been presented to the court for adjudication, regardless of whether they are presented during the course of a trial or some other evidentiary hearing or proceeding. That is particularly so, where, as here, there not only was no objection from the State at the evidentiary hearing but the circumstances reveal that there was absolutely no possibility of any surprise or unfairness to the State. The State was fully aware of the Cook transcript and had had the document in its possession for many years. In these circumstances, the purposes of Rule 15 were fully served by permitting Mr. Banks to rely on the Cook transcript at the federal evidentiary hearing.

As the petitioner notes, this Court already has suggested strongly that Rule 15(b) may be applied when issues are tried in evidentiary hearings in habeas corpus cases. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 696 (1993). Indeed, the Fifth Circuit itself has operated under that assumption in several cases. *See, e.g., James v. Whitley*, 926 F.2d 1433, 1435 n.3 (5th Cir. 1991), *cert. denied sub nom. James v. Cain*, 516 U.S. 918 (1995); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 916 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

In fact, several federal courts (including the Fifth Circuit itself in a non-habeas case) have gone even further, relying on Rule 15(b) in reaching claims that were not included in the pleadings but that had been litigated by the parties in, for example, motions for summary judgment or preliminary injunction hearings. *See, e.g., Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 n.1 (1st Cir. 2000) (treating complaint as effectively amended under Rule 15(b) to include separate sexual harassment claim because both parties briefed the issue in their summary judgment memoranda); *Clomon v. Jackson*, 988 F.2d 1314, 1323 (2d Cir. 1993) (affirming denial of motion for judgment on the pleadings where, although pleadings were

"scant," "the undisputed facts as presented on the summary judgment motion served as a basis to deem the complaint amended to conform with the proof" under Rule 15(b)); *Apple Barrel Productions*, 730 F.2d at 388-89 (holding that claim for misappropriation of intellectual property, although not included in pleadings, was properly before the district court where plaintiff introduced testimony and submitted arguments regarding that claim at preliminary injunction hearing without objection from defendant).[10/]

The court of appeals' rigid adherence to its cramped construction of Rule 15 also constitutes a departure from the equitable principles that appropriately govern the exercise of the federal courts' habeas power. This Court has long recognized that the writ of habeas corpus should be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see also Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the

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10/ Some federal courts have declined to apply Rule 15(b) simply on the basis of matters raised in the context of a summary judgment motion. *See, e.g., Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995); *see also Independent Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001) (citing conflicting D.C. Circuit cases and noting that "[i]t is an open question whether the Federal Rules permit parties to impliedly consent to 'try' issues not raised in their pleadings through summary judgment motions"). None of these cases, however, involves a situation where, as here, a matter was fully litigated by consent in the course of a federal evidentiary hearing and a reviewing court nevertheless held that the pleadings could not be deemed amended to include that claim solely on the basis that an evidentiary hearing is not a "trial."

ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim."); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) (granting equitable tolling of applicable statutory limitations period in capital case "when the petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair"), *cert. denied*, 534 U.S. 944 (2001). These principles counsel in favor of adjudication of Mr. Banks's full *Brady* claim (including the portion based on the Cook transcript). This is especially so where, as emphasized above, there has been no suggestion that the failure to amend affected in any way the State's presentation at the evidentiary hearing, and the State itself is solely responsible for the petitioner's ignorance of the transcript's existence at the time he filed his petition.

Although principles of federalism and comity appropriately restrain the federal courts from considering matters in habeas cases that could have been but were not presented in state court, the issue here is simply the construction and application of a federal rule of civil procedure; federalism and comity concerns are not implicated. Moreover, even if there were some reason to afford Texas courts the first opportunity to hear this claim, Texas has clearly signaled its lack of interest in doing so. After the petition for certiorari in this case was filed, Mr. Banks filed a petition for habeas corpus in state court challenging his conviction in part on the basis of the suppressed Cook transcript. His petition was summarily denied. *See Ex parte Banks*, No. 13,586-06 (Tex. Crim. App. Mar. 10, 2003) (per curiam) (unpublished order). As a result, there is no reason for the federal courts to abstain from hearing Mr. Banks's *Brady* claim regarding the suppressed Cook transcript. *Cf. Williams v. Taylor*, 529 U.S. 420, 444 (2000) (explaining that where state post-conviction relief was no longer available once the facts forming the basis of jury bias claim came to light, "though the state

courts did not have an opportunity to consider the new claims, petitioner cannot be said to have failed to develop them in state court by reason of having neglected to pursue remedies available under [state] law").

In this case, Mr. Banks's failure specifically to mention the prosecutors' suppression of the Cook transcript in his petition for habeas corpus is attributable solely to the State's concealment of its existence. The State should not be permitted to rely on its own wrongful conduct to avoid adjudication of a substantial constitutional question that may have been responsible for the jury's guilty verdict. There is no serious dispute that the transcript was suppressed and that Mr. Banks only learned of its existence after he had exhausted his state remedies. Accordingly, there appears to be no question that Mr. Banks has shown cause for not developing this claim in state court. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999).

And, of course, neither the district court nor the court of appeals relied on any alleged state procedural default as a basis for failing to reach the merits of Mr. Banks's *Brady* claims regarding the Cook transcript. Rather, the courts below based their rulings entirely on the proceedings in federal court on Mr. Banks's habeas petition. Under these circumstances, this Court should, at the very least, vacate the judgment and remand to the district court with instructions to address whether Mr. Banks was prejudiced by the State's suppression of the transcript and, if so, to order a new trial. Given, however, that the critical importance of Cook's guilt-phase testimony is apparent on the face of the record now before the Court, and that the transcript's mere existence demonstrates that Cook lied on the stand when he said he had spoken to no one about his testimony prior to trial, the more appropriate course may be for this Court simply to conclude, based on its own review, that the prosecution's suppression of the transcript warrants a new trial.

B. The Petitioner Should Not Be Penalized for Failing to Discover Sooner that *Brady* Evidence Was Wrongfully Withheld.

The prosecution also suppressed the fact that one of the State's key witnesses – Robert Farr – was a police informant paid for his role in the investigation of this case. At trial, Mr. Farr denied that he was a paid informant, and the State did not correct this erroneous testimony. Pet. App. A at 5, 23 (quoting Pet. App. B at 4). Instead, the State assured the jury that his testimony was truthful. The prosecutors told the jury that Mr. Farr "ha[d] been open and honest with you in every way," and that his testimony was of the "utmost significance." Pet. App. C at 44; 10 SR 2579. After his trial and after Mr. Banks's state habeas petitions had been denied, Mr. Banks located Mr. Farr – who had since moved to California – and learned that, contrary to his trial testimony, Mr. Farr was in fact a paid informant in connection with Mr. Banks's case, and that his trial testimony on key points was inaccurate. *See* 3 R at 000693-94; Pet. App. C at 43.

In the federal habeas proceeding, Mr. Banks argued that the State violated *Brady* by failing to disclose Mr. Farr's paid-informant status prior to trial, and by failing to correct Mr. Farr's false trial testimony that he was not an informant. At his federal evidentiary hearing, Mr. Banks presented testimony from Bowie County Deputy Sheriff Huff, the lead investigator in the case, and two affidavits from Mr. Farr himself, confirming that Mr. Farr was paid to assist the police in obtaining evidence against Mr. Banks. Pet. App. A at 3, 9-10, 16. The district court adopted the magistrate's recommendation that relief be granted on this claim. Pet. App. B at 6.

The court of appeals reversed, holding that Mr. Banks had not shown cause for his failure to develop the factual basis for this claim in state court and that Mr. Farr's and Deputy Huff's testimony was not "exhausted." *Id.* at 19-20, 22-23. The court concluded that, because Mr. Banks suspected that Mr. Farr was a paid informant prior to the conclusion of his state habeas proceedings, he should have made more of an effort to uncover evidence of that fact. Pet. App. A at 19, 21-22. According to the court of appeals, the true "cause" of Mr. Banks's ignorance of Farr's status as a paid informant was Mr. Banks's own "lack of diligence." *Id.* at 22. As a result, the court concluded that the district court erred in conducting an evidentiary hearing on this claim and in receiving the evidence presented at that hearing. *See id.* at 20.

The court of appeals' decision inappropriately penalizes the defendant for failing to discover sooner that the State had wrongfully withheld, and continued wrongfully to withhold, evidence. Here, the responsibility for Banks's ignorance of Farr's paid-informant status rests solely with the State, which concealed that status for years. *See Strickler*, 527 U.S. at 283 (facts that documents were suppressed and trial counsel relied on prosecution's open-file policy were "fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim"). This should be sufficient to establish the existence of cause for any procedural default that may have occurred at the state level. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a showing that interference by public officials impeded counsel's efforts to comply with state procedural rule constitutes cause); *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").

Penalizing the defendant for failing to discover sooner that evidence was illegally suppressed is particularly inappropriate in this case, because the prosecutors assured the jury that Mr. Farr testified truthfully, even though they knew he had not. Moreover, the suppressed evidence – *i.e.*, the fact that a State witness was a paid informant – was uniquely within the control of the State. *See Mandatory Justice* at 50 ("While disclosure of all *Brady* information is

important, a special responsibility exists where," as in this case, "the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony."). Mr. Banks already had questioned the only other person who was privy to the relationship – Mr. Farr – and the State assured the jury that his denials were true. By placing the burden on Mr. Banks to discover that this testimony was false, the court of appeals effectively rewarded the prosecutors' dishonest and illegal conduct by insulating the conviction from meaningful review precisely because of their misconduct.[11/] *Cf. Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) ("Since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."). This ruling sets a dangerous precedent by providing the prosecution with an incentive to conceal *Brady* material for as long as possible.

C. The Court of Appeals' Materiality Analysis Was Seriously Flawed.

Under this Court's precedents, the standard normally applied for determining whether withheld *Brady* evidence is material is whether there is "a reasonable probability" that the defendant's conviction or sentence would have been different had the suppressed evidence been disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, "[t]he question is not whether the defendant would more likely than not have received a

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11/ The court of appeals ultimately did address the merits of this *Brady* claim and held that the suppressed evidence was immaterial. *See* Pet. App. A at 32-33. As discussed below and more fully in petitioner's brief, the court of appeals' materiality review was significantly flawed.

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434. Importantly, even under this standard, "[a] defendant need not demonstrate that after discounting the inculpatory evidence, there would not have been enough left to convict." *Id.* at 434-35; *accord id.* at 435 & n.8.

Not all *Brady* claims are the same, however. Some such claims may involve not only the suppression of exculpatory or impeachment information (here, Farr's status as a paid informant in this very case) but also the continuing suppression of that information even in the face of explicit sworn testimony to the contrary by State witnesses (here, Farr's own denial of his status as a paid informant). In these circumstances, where by its very nature the *Brady* claim also entails prosecutorial reliance on testimony known to be false, this Court's decisions strongly indicate that a different, less onerous materiality standard ought to apply. In *United States v. Agurs*, for example, the Court stated that, where the prosecution knowingly presents false testimony, relief should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. 97, 103 (1976) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972), and *Napue*, 360 U.S. at 271).

The Court has not departed from this standard, even though it has revisited the subject on more than one occasion since *Agurs* was decided. In *Kyles*, for example, the Court explained that *Agurs* recognized "three situations in which a *Brady* claim might arise," including claims in which "previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured." 514 U.S. at 433. *Kyles* did not suggest any alteration of the *Agurs* standard for such claims, even though *Kyles* recognized that the Court's decision in *Bagley* "abandoned the distinction" between the other two kinds of *Brady* claims identified in *Agurs*, *i.e.*, claims in which the defense has made a general request for

exculpatory or impeachment material and claims in which the defense has requested specific items or categories of information asserted to be exculpatory. *See* 514 U.S. at 433-34 (citing *Bagley*, 473 U.S. at 682).

Here, the court of appeals reversed the district court's grant of relief because it concluded that Farr's paid informant status "does not present a reasonable probability that the jury would have found differently concerning future dangerousness." Pet. App. A at 33. There are two flaws with this ruling.

First, even assuming that the *Kyles* standard – not the more lenient *Agurs* standard – applies in this case, the court of appeals' denial of relief represents an unreasonable application of that standard. The court of appeals itself acknowledged that Farr's testimony that Mr. Banks intended to commit armed robberies and, if necessary, kill the victims, "was crucial to the State's position on future dangerousness." Pet. App. A at 32. Yet it concluded that the withheld evidence – *i.e.*, Farr's status as a paid informant – would not have contradicted that testimony directly, and that Farr's general credibility had been impeached in other ways, for example, by testimony indicating that he had been a paid informant in other cases in the past. Pet. App. A at 32-33. This analysis ignores the independent significance that the jury might attach to the witness's status as a paid informant *in this case*. The court of appeals' apparent supposition that all impeachment evidence is created equal is unfounded. *See Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."). The court similarly defied logic in suggesting that the jury would have regarded Banks's willingness to obtain a gun for Farr as equally probative on the question of future dangerousness as Banks's own alleged intent to commit armed robberies. *See* Pet. App. A at 32.

Moreover, the impeachment value of Farr's paid-informant status was not simply that it revealed a potential inducement to lie on the stand. Rather, revelation of Farr's paid-informant status would have proved to the jury that he did in fact lie on the stand – at least about that aspect of his testimony. A reasonable jury might well have concluded that his testimony on other issues was unworthy of trust. Particularly where, as here, the district court has found that suppression of impeachment evidence regarding a key penalty phase witness "undermined the reliability of the jury's verdict regarding punishment," a court of appeals should be especially reluctant to usurp the jury's role by concluding that it would have reached the same result even if it had had the opportunity to hear the omitted evidence. *See* Pet App. C at 44.

Second, the court of appeals erred, in perhaps an even more fundamental way, in concluding that the *Agurs* standard – "any reasonable likelihood that the false testimony could have affected the judgment of the jury" – could not possibly apply in this case. The court reached that conclusion by distinguishing between *Brady* claims on the one hand, and claims in which the prosecution knowingly used false evidence on the other. *See* Pet. App. A at 29-32. That distinction, however, cannot be reconciled with either *Kyles* or *Agurs*, both of which expressly recognized that one species of *Brady* claim can arise precisely in those circumstances where the prosecution knowingly relies on perjured testimony. *See Kyles*, 514 U.S. at 433 (noting that *Agurs* referred to prosecutorial reliance on perjured testimony as one of "three situations in which **a *Brady* claim** might arise") (emphasis added). Thus, this Court does not view claims regarding suppression of impeachment evidence

and claims regarding presentation of false testimony to be mutually exclusive.[12/]

Moreover, even if Banks were required to plead his claim that the prosecution failed to correct Farr's false testimony separately from his claim that prosecutors wrongly suppressed Farr's paid-informant status, the court of appeals' conclusion that the former claim was "unexhausted" because it was not made in state court is erroneous for the reasons stated above – *i.e.*, that, by failing to correct Farr's perjury, and by suppressing his status as a paid informant, the State itself prevented Mr. Banks from developing the factual basis for such a claim in state court. *See* Pet. App. A at 32.

III. DEFENSE COUNSEL'S "DISMAL PERFORMANCE" AT THE PENALTY PHASE DEPRIVED MR. BANKS OF HIS CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE THAT LIKELY WOULD HAVE PROMPTED THE JURY TO SPARE HIS LIFE.

The magistrate judge found that Mr. Banks received ineffective assistance of counsel at the penalty phase, and that counsel's deficient performance prejudiced the outcome of his trial. Pet. App. C at 24. The court of appeals' reversal of the grant of relief resulted from the court's failure to weigh all of the available mitigating evidence against all of the aggravating evidence as required by this Court's precedents.

12/ Notably, the court of appeals' ruling that such claims are "separate and distinct" was based on a pre-*Kyles* Fifth Circuit case, *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1991). *See* Pet. App. A at 29-30.

A. The Integrity of the Capital Sentencing Process Depends on Adequate Representation at Each Stage of the Proceedings.

Adequate legal representation is essential to the effective functioning of the adversarial system. "The lack of adequate counsel to represent capital defendants" has been described as "likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Mandatory Justice* at 1. As Yale law professor Stephen Bright observed:

> Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1837 (1994).

Indeed, some commentators have concluded that the quality of counsel in capital cases is often outcome determinative. Citing Prof. Bright, the Constitution Project's *Mandatory Justice* report concluded that "the quality of defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused." *Mandatory Justice* at 1. Similarly, Justice Ginsburg recently reflected: "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay

applications in which the defendant was well represented at trial. . . . People who are well represented at trial do not get the death penalty." Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, Associated Press, Apr. 10, 2001 (quoting Justice Ginsburg's remarks on April 9, 2001).

As both the district court and the court of appeals acknowledged, Mr. Banks did not receive adequate representation in his capital murder trial. His lawyer presented no evidence at the guilt phase of the trial and failed to launch any substantial attack on the State's weak, circumstantial case.[13/] Regarding the penalty phase, the magistrate judge found "an almost complete lack of preparation," as counsel "waited until the jury rendered its guilty verdict before instructing Bank[s]'s mother to gather witnesses for the punishment phase, which began the following day." Pet. App. C at 22. Mr. Banks's lawyer did not interview any of these witnesses before they testified, and did not conduct an investigation into the many mitigating factors and circumstances that would have shown that Mr. Banks did not present a danger to others in the future. Pet. App. C at 22. As the magistrate judge observed, "[n]either trial counsel nor the investigator attempted to obtain a social history from Banks or his family," "[n]either of Banks's parents was questioned about his childhood," and "[n]either of his parents was told they would be called as witnesses." *Id.* Based on this "dismal performance," the district court ordered relief from the death sentence. Pet. App. B at 5, 6; Pet. App. C at 54.

13/ Although the magistrate judge stopped short of finding that Mr. Banks's lawyer was ineffective at the guilt phase, she did note that Banks was prejudiced by counsel's "deficient performance, including aspects of his performance during the guilt phase of the trial." Pet. App. C. at 24.

The failures described by the magistrate judge clearly constitute ineffective assistance under this Court's precedents. Moreover, unlike many cases, there is no suggestion in this case that counsel's decision to forgo basic preparation for the penalty phase reflected some "tactical judgment not to present mitigating evidence at sentencing and to pursue some alternate strategy instead." *Wiggins v. Smith*, No. 02-311, slip op. at 8 (U.S. June 26, 2003) (citing *Strickland*, 466 U.S. at 690-91). Thus the only question here is whether Mr. Banks was prejudiced by his lawyer's failings. The court of appeals erroneously answered that question in the negative, and its decision should be reversed.

B. The Court of Appeals Erred in Failing to Weigh the Mitigating Evidence in the Aggregate.

As this Court has explained, "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be lower" than that used to assess the impact of newly discovered evidence. *Strickland*, 466 U.S. at 694. As a result, a defendant need not demonstrate by a preponderance of the evidence that his counsel's errors determined the outcome of the proceeding. *Id.* Rather, he need only show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

The court of appeals' decision to reverse the district court's grant of relief was not based on a determination that Mr. Banks received adequate representation. On the contrary, the court agreed that "Banks has demonstrated deficient-performance." Pet. App. A at 36; *see id.* at 39, 41. Nor did the court of appeals find that Mr. Banks's lawyers would not have discovered evidence of mitigating factors had an appropriate investigation been conducted. Rather the court separately considered each piece of omitted evidence

that it believed was properly before it, and concluded that there was not a reasonable probability that any one piece of evidence – standing alone – would have altered the outcome of the proceeding.[14/] Pet. App. A at 39, 40, 41, 43-44.

In *Williams v. Taylor*, this Court held that the Virginia Supreme Court's determination that the petitioner was not prejudiced by his lawyer's inadequate performance was "unreasonable, insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." 529 U.S. 362, 397-98 (2000); *see also id.* at 397 (citing with approval the Virginia lower court's "assessment of the totality of the omitted evidence"); *cf. Kyles*, 514 U.S. at 436 (noting that materiality prong of *Brady* analysis should be considered in terms of "suppressed evidence considered collectively, not item by item"). This Court recently reaffirmed the principle that, in determining whether a defendant was prejudiced by his counsel's substandard performance, the court must "evaluate the totality of the evidence." *Wiggins*, slip op. at 24; *see id.* at 22 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

In this case, the court of appeals never weighed all of the mitigating evidence that would have been presented had Mr. Banks received adequate representation. It thus never properly answered the question whether Mr. Banks was prejudiced by his lawyer's errors, as required by *Strickland v. Washington*, 466 U.S. 668 (1984). The court's flawed

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14/ The court held that some of the evidence should not have been considered in the federal habeas proceeding because it was "unexhausted." *See, e.g.*, Pet. App. A at 38, 42.

approach was particularly significant in light of the scant aggravating evidence produced by the State.

In contrast, the magistrate judge and the district court – which did properly address the question – concluded that there was a reasonable probability that the jury would not have sentenced Mr. Banks to die if it had been made aware of the facts that would have been brought to its attention by effective counsel. *See* Pet. App. C at 24-25. The available mitigation evidence in this case included evidence that Mr. Banks had a "troubled family life as a youth," that his "father abused alcohol and subjected Banks to repeated incidents of brutality and harsh discipline," that "[a]s a child Banks witnessed many episodes of cruelty directed at his mother," and that "Banks himself had no history of violence or alcohol abuse and seemed to possess a self-control that would suggest no particular risk of future violence." Pet. App. C at 23. As the court of appeals observed, evidence existed that Mr. Banks may have suffered brain damage, that he suffered from a chronic and disfiguring skin disease, and that "Banks was 'beaten and terrorized by his alcoholic father; at least one such incident involved young Delma's being tied to a tree and whipped'." Pet. App. A at 37 (quoting affidavit of Dr. Pina submitted to state court); *see id.* at 38.

In addition to failing to present this mitigating evidence concerning Mr. Banks's social history, Mr. Banks's lawyer failed to prepare effectively for his cross examination of one of the State's two penalty-phase witnesses. The magistrate judge found that, had trial counsel interviewed Vetrano Jefferson, who testified that Mr. Banks once struck him with a gun and threatened him, counsel would have learned that "Jefferson, not Banks, was the aggressor" in the fight, which occurred when Jefferson threatened his own

sister, who was Mr. Banks's pregnant common-law wife.[15/] Pet. App. C at 22-23. On the other hand, Mr. Banks had no prior convictions, and the principal testimony concerning future dangerousness was provided by a witness whom we now know was a paid informant for the State, and who lied at trial about his role in this case. As in *Wiggins*, "the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where [the Court] found prejudice as the result of counsel's failure to investigate and present mitigating evidence." *Wiggins*, slip op. at 25.

As the Court made clear in *Williams v. Taylor*, Mr. Banks had a constitutionally protected right to provide the jury with the mitigating evidence that his trial counsel failed to discover or present. 529 U.S. at 393. The Court should reverse the decision of the court of appeals, to make clear that this right cannot be overlooked on the basis of an item-by-item evidentiary review but must be evaluated instead through a fair comparison of what the jury actually heard with the totality of what it would have heard had counsel performed in a competent manner. Reversal in this case is essential to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). As this Court has stated, "[w]hen the choice is between life and death, that risk is unacceptable and

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15/ Mr. Jefferson testified at the federal evidentiary hearing: "I was drunk and one day I came over and I was threatening my sister and he defended her. And when he told me to leave her alone, I told him I'll whoop his ass. So we got into a fight. And he got a gun and hit me in the face with it." Fed. Tr. at 166. When asked who started the fight, Jefferson admitted "I did." *Id.*

incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry*, 492 U.S. at 328.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, thereby establishing the foundation for a lawyer's obligations to his client in all representations. In 1908, the ABA adopted

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel has made a monetary contribution to this brief's preparation or submission. In accordance with Rule 37.3, two letters are being filed concurrently with this brief granting permission by both parties to the filing of this *amicus* brief.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

the original *Canons of Professional Ethics*, and in 1913 the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA issued the *Model Code of Professional Responsibility*, which subsequently was adopted by the vast majority of state and federal jurisdictions. In 1983, the ABA drafted the *Model Rules of Professional Conduct*, since adopted by all but seven jurisdictions, and in February 2002, the ABA approved amendments to the Rules consistent with recommendations of its "Ethics 2000" Commission.

In addition, the ABA has adopted numerous policies concerning the administration of justice and effective and ethical representation by both prosecution and defense counsel. These policies, addressing the due process and right to counsel guarantees under the Constitution,[2] include the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*,[3] *ABA Standards for Criminal Justice Discovery and Trial by Jury*,[4] and *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[5]

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[2] Relevant portions of the policies cited herein are attached hereto at Appendix A.

[3] *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* (3d ed. 1993) ("ABA Prosecution Standards").

[4] *ABA Standards for Criminal Justice Discovery and Trial by Jury* (3d ed. 1996) ("ABA Criminal Discovery Standards").

[5] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) ("ABA Death Penalty Guidelines").

This case involves claims both of inappropriate conduct by counsel for the prosecution and of ineffective assistance of counsel for the defendant. These claims fall within the scope of the ABA Standards that have been developed for prosecutors in all cases and for defense counsel in death penalty cases. Although the ABA Standards do not necessarily establish constitutional guidelines for counsel, this Court previously has cited to the ABA's Standards when addressing constitutional claims. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Indeed, in its recent decision in *Wiggins v. Smith*, 71 U.S.L.W. 4560 (U.S. June 26, 2003), *rev'g sub nom. Wiggins v. Corcoran*, 288 F. 3d 629 (4th Cir. 2002), this Court cited extensively from various ABA Standards in addressing the defendant's Sixth Amendment claims. "Prevailing norms of practice as reflected in the American Bar Association Standards and the like . . . are guides to determining what is reasonable." *Wiggins*, 71 U.S.L.W. at 4563 (quoting *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)). The Court's consideration of the ABA Standards similarly would be appropriate in this instance.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is essential to the fair administration of the death penalty in the United States that both prosecutors and defense counsel undertake their representation appropriately, effectively, and ethically. Due process demands that the ultimate penalty in our justice system not be implemented unless both the defendant's guilt and the existence of aggravating factors have been established clearly and fairly following the presentation of all relevant evidence. A death sentence must be called into serious question if it is found that the prosecution has withheld material evidence from the

defense or has presented false testimony, or that defense counsel has conducted an inadequate investigation or examination of witnesses or has failed to present mitigating evidence.

ABA Standards Applicable to Counsel for the Prosecution

ABA Prosecution Standard 3-1.2(c) provides that "[t]he duty of the prosecutor is to seek justice, not merely to convict." The Commentary to this Standard states:

> Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent, as well as to convict the guilty, to guard the rights of the accused, as well as to enforce the rights of the public.

ABA Prosecution Standard 3-1.2 cmt. at 5.

Although this Standard cannot be equated to any specific constitutional due process requirement, a number of other ABA Standards intended to uphold constitutional due process rights do flow directly from this same proposition that it is the prosecutor's duty to seek justice and protect the innocent.

For example, several ABA Standards deal with the prosecution's obligation to disclose to the defense information that tends to negate guilt or mitigate the offense charged,[6] statements made by witnesses to law enforcement

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[6] ABA Prosecution Standard 3-3.11(a); ABA Criminal Discovery Standard 11-2.1(a)(viii).

officials,[7] and the relationship between the prosecution and any witness whom the prosecution intends to call at trial.[8]

These ABA Standards, by helping ensure that the defendant has the opportunity to present all relevant information at trial regarding his guilt or appropriate punishment, reinforce a core principle of constitutional due process. As this Court has held:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

In this case, notwithstanding both the prosecution's assurances that it would disclose to Petitioner all information called for by the ABA Standards and notwithstanding the Petitioner's discovery requests for this information, it is undisputed that the prosecution failed to make such information available to the Petitioner, in violation, at a minimum, of applicable ABA Standards addressing constitutional due process concerns.

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[7] ABA Criminal Discovery Standard 11-2.1(a)(ii).

[8] *Id.* at 11-2.1(a)(iii).

The ABA Prosecution Standards regarding disclosure not only address due process concerns, but also are relevant to the exhaustion issue in this case. The prosecution's disclosure obligations are continuing in nature, applicable even after the trial has ended, precisely because lack of disclosure at any time could result in a miscarriage of justice. If material information is withheld after conviction, counsel pursuing post-conviction *habeas corpus* relief have much more difficulty in ascertaining the existence of such information and raising claims that depend upon that information.

Another relevant ABA Standard provides that prosecutors should not knowingly offer false evidence or fail to seek the withdrawal of such evidence upon discovery of its falsity.[9] The rationale for prohibiting the presentation of false testimony by the prosecution is apparent. As this Court has held on a number of occasions, it is "clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio,* 405 U.S. at 153.

In this case, the prosecution violated this Standard by presenting indisputably false testimony by two witnesses (Farr and Cook). Farr falsely asserted that he was not an informant for the prosecution and provided false testimony concerning Petitioner's purported use of his gun. Tr. Ex. B-01 ¶ 8; 10 SR at 2500-02; 9 SR at 2279. Cook testified falsely that he had not discussed his testimony with the prosecution before the trial. Tr. at 45-47; Tr. Ex. B-04.

In a case such as this one, where a death sentence is involved, the constitutionality of the prosecution's use of

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[9] ABA Prosecution Standard 3-5.6(a).

false testimony in obtaining that sentence should be examined closely.

ABA Standards Applicable to Counsel for the Defendant

The ABA Death Penalty Guidelines require that defense counsel conduct a thorough and independent investigation not only of the factors relating to the guilt phase of a death penalty proceeding, but also of the factors relating to the penalty phase.[10] As the Commentary to the Guidelines explains, such an investigation is necessary for counsel to develop trial strategy in both phases of the trial. Investigation also is essential in order for defense counsel to present a coherent case in the penalty phase and to cross-examine the prosecution's witnesses and rebut the prosecution's evidence.[11]

This continuing obligation of counsel to investigate in order to represent their client adequately during the penalty phase of a trial is consistent with this Court's prior holdings on the right to counsel. As the Court held in *Williams*, 529 U.S. at 393, a death penalty defendant has "a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *See also Wiggins*, 71 U.S.L.W. at 4563-4564.

Defense counsel in this case indisputably failed to conduct the thorough and independent investigation called for under the ABA Guidelines. Indeed, counsel did not undertake any significant preparation at all for the penalty

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[10] ABA Death Penalty Guidelines 10.7.A, 10.11.A.

[11] *See* ABA Death Penalty Guideline 10.7 cmt. at 81-86.

phase. Counsel failed to conduct an investigation of the Petitioner's social history, failed to interview the prosecution's two penalty phase witnesses (Farr and Jefferson), and failed to prepare the witnesses who testified for the Petitioner. Individually and collectively, these failures raise significant Sixth Amendment concerns.

ARGUMENT

I. THE OBLIGATIONS OF THE PROSECUTION

A. THE PROSECUTION HAS AN OBLIGATION TO MAKE MATERIAL INFORMATION AVAILABLE TO THE PETITIONER PRIOR TO THE TRIAL

1. Applicable ABA Standards

There are a number of ABA Standards that address the prosecution's obligation to make material information available to the defense.

Paragraphs (a) and (b) of ABA Prosecution Standard 3–3.11 – Disclosure of Evidence by the Prosecutor – provide as follows:

> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

> (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

Paragraphs (a)(ii), (iii) and (viii) of ABA Criminal Discovery Standard 11-2.1 – Prosecutorial Disclosure – provide as follows:

> (a) The prosecution should, within a specified 'and reasonable time prior to trial, disclose to the defense the following information and material:
>
> . . . .
>
> (ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.
>
> (iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.
>
> . . . .

> (viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

The prosecutor's obligation to disclose relevant information also is incorporated into the ABA's *Model Rules of Professional Conduct* ("MRPC"). In particular, MRPC R. 3.8(d) provides that the prosecutor in a criminal case shall:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The ABA does not assert that its Standards and Model Rules, in and of themselves, establish constitutional standards by which prosecutorial conduct should be evaluated in order to determine the validity of a conviction.[12]

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[12] ABA Prosecution Standard 3-1.1 provides that the Standards are to be used as a guide to professional conduct and performance and not as criteria for the judicial evaluation of prosecutorial misconduct or the validity of a conviction. However, this Standard goes on to provide that the ABA Standards "may or may not be relevant in such judicial evaluation, depending upon all the circumstances." *Id.*

However the ABA Standards and Model Rules regarding disclosure by the prosecution are intended to implement generally this Court's rulings in *Brady* and its progeny. They therefore may be helpful in the evaluation of the constitutional issues raised by the Petitioner regarding prosecutorial misconduct. Indeed, this Court has cited ABA Prosecution Standard 3-3.11(a) in describing generally the obligation of the prosecution to disclose information regarding a prosecution witness. *See Giglio*, 405 U.S. at 153-54.[13]

The reason for the constitutional disclosure requirement is, as this Court held in *Brady*, the "avoidance of an unfair trial to the accused." 373 U.S. at 87. The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Justice is done when evidence favorable to the defendant is disclosed because such evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

2. *Factors Bearing on the Materiality of Suppressed Evidence*

It is not enough simply to show that the prosecution withheld information from the defendant. An important element in considering *Brady* claims is the materiality of the withheld information. *See, e.g., Bagley*, 473 U.S. at 674-76.

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[13] This Court cites in *Giglio* to other ABA Standards as well. *Id.* at 154 (citing to ABA Project on Standards for Criminal Justice, Discovery & Procedure Before Trial § 2.1(d) (approved Draft 1970) (current version at ABA Criminal Discovery Standard 11-2.1(a))).

The ABA takes no position on whether the information withheld by the prosecution here satisfies this Court's materiality standard. However, ABA Criminal Discovery Standard 11-2.1(a), quoted in relevant part above, sets forth a number of specific categories of information that should be disclosed by the prosecution. These specific categories of information represent the types of information that are most likely to be material. This Standard therefore is applicable to this Court's consideration of the materiality of the information that the prosecution indisputably withheld in this case.

a. Prosecution Witness Farr's Status as an Informant

Subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1 requires that the prosecution disclose the nature of any relationship that it has with any of the witnesses that it calls, including "any agreement [or] understanding ... that constitutes an inducement for the cooperation or testimony of the witness." The Commentary to this subparagraph makes clear that it includes an obligation to disclose whether a witness is a government informant. *Id.* cmt. at 24 ("Under this provision, the government is required to disclose, first of all, whether any of its trial witnesses are . . . informants . . . .").[14]

The obligation to disclose the nature of the relationship between the prosecution and its witnesses is raised in this Petition with respect to two of the State's witnesses. It is uncontested that Witness Farr was a

[14] In *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957), this Court held that a defendant has the right to learn the identity of any informant whose testimony might be helpful to the defense.

government informant who had been paid by Deputy Sheriff Huff to obtain the Petitioner's gun. It also is uncontested that the State withheld this fact from the Petitioner not only during the trial, but also during the Petitioner's three state *habeas* proceedings. Such withholding violated ABA Criminal Discovery Standard 11-2.1(a)(iii).

The mere fact of a relationship between the State and a witness that can influence the witness's testimony constitutes strong impeachment evidence, as this Court found in *Giglio*. 405 U.S. at 154-55. Indeed, in *Giglio*, this Court reversed the conviction because the prosecution failed to disclose a promise of immunity that it had made to the chief prosecution witness. *Id.*

In this case, however, there is more than the mere fact of the relationship that bears on the materiality of the withheld information. Witness Farr was one of two prosecution witnesses to testify at the penalty phase regarding the future dangerousness of the Petitioner. Farr testified at trial that the Petitioner had wanted to retrieve his gun so that he could commit armed robberies. 10SR at 2500-02. This testimony was characterized by the prosecution as being of "upmost importance" in its argument to the jury that imposition of a death sentence was appropriate. 10SR at 2579. But the testimony was false. The undisclosed fact was that Farr, at Deputy Sheriff Huff's direction, had asked the Petitioner to retrieve his gun; thus, Petitioner had not expressed any motive indicative of future dangerousness. Tr. Ex. B-01 ¶ 8.

If, as required by subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1, Farr's status as an informant directed to request Petitioner to retrieve the gun

had been "disclosed and used effectively," [15] counsel for the defense could have countered the prosecution's purported showing that the Petitioner would be dangerous in the future if not executed.

b. Prosecution Witness Cook's Relationship with the Prosecution

The prosecution's undisclosed relationship with Witness Cook also potentially violates subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1. Petitioner asserts that Cook's testimony was given in exchange for a promise not to prosecute other charges against Cook, a claim that the Respondent disputes. To the extent that this Court determines that Cook's testimony was given pursuant to an understanding with the prosecution, subparagraph (a)(iii) requires that fact to have been disclosed. Under *Giglio,* such a failure to disclose would be a material factor. 405 U.S. at 153-54.

c. Transcript of Cook Interview

Even disregarding whether there was any understanding between the prosecution and Cook, it is undisputed that the prosecution withheld a 74-page transcript of a pre-trial interview with Cook. Tr. at 45-47; Tr. Ex. B-04. Failure to disclosure this transcript to the defense is a violation of ABA Criminal Discovery Standard 11-2.1, subparagraph (a)(ii), which requires production of written statements of persons who offer information regarding the offense charged. If this interview transcript had been available to defense counsel, it could have been used to impeach Cook's assertion that he had not discussed his testimony with the prosecution. In addition, the transcript

[15] *Bagley*, 473 U.S. at 676.

contained other impeachment material, such as information contradicting the official statement by Cook that was turned over to the Petitioner, as well as expressions of doubt by law enforcement officials and the prosecutor regarding Cook's credibility. Tr. at 45-47; Tr. Ex. B-04.

B. THE PROSECUTION HAS AN OBLIGATION TO MAKE INFORMATION AVAILABLE TO THE PETITIONER SUBSEQUENT TO THE TRIAL

Farr's status as an informant never was disclosed or even acknowledged by the prosecution until revealed by Deputy Sheriff Huff during the Petitioner's federal *habeas* proceeding. Tr. at 86.[16] As a result, this evidence was not considered in the state *habeas* proceedings. The Fifth Circuit found that the exhaustion doctrine barred use of this evidence for the first time in the federal proceedings. *Banks v. Cockrell*, No. 01-40058, slip op. at 19-20 (5th Cir. Aug. 20, 2002). Petitioner now raises the issue of the extent to which he had cause for his failure to present evidence regarding Farr's status in the state proceedings.

In *Strickler*, this Court found that a claim based upon withheld evidence is not procedurally barred when the failure results from: (a) the failure of the prosecution to produce the evidence; (b) the petitioner's reliance on the prosecution's open file policy; and (c) the State's assurances during the state *habeas* proceeding that the petitioner has received everything known to the government. *Strickler*, 527 U.S. at 289. This Court left open the question of

[16] Deputy Sheriff Huff revealed the connection at the hearing only after the Petitioner located Farr in California and obtained the declaration from him.

whether any one or two of these factors could overcome a failure to present the evidence in state *habeas* proceedings. *Id.*

Although the ABA takes no position on whether the Petitioner is barred from raising the evidence in his federal petition as a consequence of his failure to present the evidence in the state proceedings, several relevant ABA Standards address the prosecution's obligation to have made the materials available to the Petitioner after the trial and prior to the conclusion of the Petitioner's state *habeas* proceedings.

First, ABA Criminal Discovery Standard 11-4.1(c) provides that each party has "a continuing obligation to produce discoverable material to the other side." The Commentary to this Standard makes clear that the obligation continues after trial: "Even after trial . . . the discovery of exculpatory material may require reevaluation of the fairness of the conviction or of the sentence." ABA Criminal Discovery Standard 11-4.1 cmt. at 69. The prosecution's failure to make the information regarding Farr available during the state *habeas* proceedings clearly violated this obligation, and, if the information had been made available to the Petitioner, it clearly could have been presented in earlier proceedings.

Second, ABA Prosecution Standard 3-3.11(c) provides that "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." The Commentary to this Standard expands upon this obligation as follows:

> Just as it is unprofessional for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all relevant evidence without regard to its impact on the success of the prosecution.

ABA Prosecution Standard 3-3.11 cmt. at 83 (footnote omitted).

In this case, the Petitioner alleged in his third state *habeas* petition that Farr was indeed a state informant. Rather than investigate this allegation – which would have led to the State's admission of its validity during the state *habeas* proceeding – the prosecution chose not to respond to the allegation. As a consequence, the state court did not initiate a hearing on this issue and did not discuss the issue in its decision. Had the prosecution complied with Standard 3-3.11(c), the issue would have been presented to and addressed by the state court.

C. THE PROSECUTION HAS AN OBLIGATION NOT TO PRESENT FALSE TESTIMONY KNOWINGLY

A much older and more fundamental due process rule than the disclosure requirement announced in *Brady* is the rule against obtaining a conviction based upon perjured testimony. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court stated that due process is violated:

> if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

This holding was underscored in *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), where the Court stated that "allegations [of the use of perjured testimony to obtain a conviction] sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." In 1959, this Court held that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Consistent with this longstanding series of decisions, ABA Prosecution Standard 3-5.6(a) provides that:

> A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

Citing *Napue*, the Commentary to ABA Prosecution Standard 3-5.6(a) states that the Standard applies to evidence going to the credibility of a witness, as well as directly to the guilt of the defendant. ABA Prosecution Standard 3-5.6 cmt. at 101-02 & n.2.

1. Prosecution Witness Farr's False Testimony

Witness Farr's testimony was false in ways that went both to his credibility as a witness and to the question of the Petitioner's future dangerousness. This question was critical to Petitioner's due process rights because, without a finding of future dangerousness, the jury could not have imposed the death penalty.

As noted above, Farr's trial testimony that the Petitioner wanted to retrieve his gun to commit armed robberies is inconsistent with Farr's statement in *habeas* proceedings that he himself had suggested that Petitioner retrieve the gun. Tr. Ex. B-01 ¶ 8. The false testimony about the Petitioner's intent to commit armed robberies in the future clearly was important to the determination of the future dangerousness issue. Moreover, Farr's credibility on this point at trial arguably was enhanced by his additional false testimony that he was not a government informant.

It now is undisputed that Farr's testimony on both issues was false. The prosecution's actions therefore violated ABA Prosecution Standard 3-5.6(a), which requires the prosecution not to solicit such testimony and to correct the testimony if it was unsolicited.

2. Prosecution Witness Cook's False Testimony

Witness Cook testified at trial that he had spoken to no one in preparation for his testimony prior to trial. 9SR at 2314. The 74-page transcript of his interview by law enforcement officials, including handwritten notes by one of the prosecutors, conclusively demonstrates that this testimony was untrue. Tr. Ex. B-04. This transcript shows that the prosecution spent a significant amount of time with

Cook to review his statement prior to the trial. In fact, Cook confirmed at the federal *habeas* hearing that he had rehearsed his testimony with the prosecution. Tr. at 135, 137-38, 144-46. Yet, not only did the prosecution fail to correct this false testimony; the prosecution affirmatively argued to the jury that Mr. Cook's testimony was completely truthful. 10SR at 2450.

The prosecution's presentation of this false testimony, which enhanced Cook's credibility, clearly violated ABA Prosecution Standard 3-5.6(a). But its presentation also raises serious due process concerns, particularly given the prosecution's endorsement to the jury of the truthfulness of the testimony.

II. THE OBLIGATIONS OF DEFENSE COUNSEL IN DEATH PENALTY CASES

A. DEFENSE COUNSEL HAS AN OBLIGATION TO CONDUCT A THOROUGH AND INDEPENDENT INVESTIGATION WITH RESPECT TO PENALTY

The second question raised in the Petition is the extent to which the Fifth Circuit's decision contravenes *Strickland* and *Williams* in the way it weighed the materiality of the mitigation evidence that could have been presented if defense counsel had conducted an adequate investigation. The ABA Death Penalty Guidelines, which address in detail the duty to investigate and the potential materiality of the evidence that comes from such an investigation, may aid in an analysis of this issue.

1. Applicable ABA Guidelines

One of the most important obligations for defense counsel in death penalty cases is the obligation to investigate. ABA Death Penalty Guideline 10.7.A provides that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The obligation to investigate with respect to penalty, as well as guilt, is re-emphasized in ABA Death Penalty Guideline 10.11, which addresses the minimum requirements of defense counsel in preparing for the penalty phase of a proceeding. Guideline 10.11.A provides that:

> As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

Although stated as a separate obligation, the need for investigation does not exist in a vacuum. An adequate investigation is essential for counsel to present a case on the penalty issue. It is required in order to cross-examine the prosecution's witnesses effectively and to rebut aggravating factors presented by the prosecution. An adequate investigation also is necessary in order for the defense to present mitigating circumstances that will support a finding that the death penalty should not be imposed. As the Commentary to ABA Death Penalty Guideline 10.7 notes:

> Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the

> defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."

ABA Death Penalty Guideline 10.7 cmt. at 82. (quoting *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987)) and Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion, Jan./Feb. 1999, at 35).

As detailed below, the Fifth Circuit found that defense counsel's investigation of mitigation and impeachment evidence concerning penalty did not meet the minimum required level of reasonableness (a finding that the Respondent appears not to contest). *Banks*, slip op. at 36. The court went on to find, however, that the Petitioner was not prejudiced by his counsel's failure to conduct an adequate investigation. *Id.* at 39.

In *Williams*, this Court cited to the ABA's Standards for Criminal Justice, adopted in 1980, in describing trial counsel's obligation to conduct a through investigation of a defendant's background. 529 U.S. at 396 (citing to *ABA Standards for Criminal Justice* 4-4.1 cmt. at 4-55 (2d ed. 1980)). The Court concluded that defense counsel's failure to conduct such an investigation violated Williams's Sixth Amendment right to counsel. *Williams*, 529 U.S. at 398-99. The ABA Death Penalty Guidelines describe the specific application of this obligation to death penalty cases, and in *Wiggins* this Court referred to both the 1980 Standards for Criminal Justice and the ABA Death Penalty Guidelines in discussing defense counsel's obligation to investigate. *Wiggins*, 71 U.S.L.W at 4563-4564. The ABA Death Penalty Guidelines are similarly applicable to a determination in this case of whether defense counsel's

performance was sufficiently prejudicial to violate the Petitioner's Sixth Amendment rights.

2. Defense Counsel's Failure to Obtain Social History and Investigate Mitigating Psychological Evidence

It is uncontested that the Petitioner's trial counsel failed to obtain a social history or investigate mitigating psychological evidence. The Fifth Circuit found that this failure fell below an objective level of reasonableness. *Banks*, slip op. at 36.

ABA Death Penalty Guideline 10.11.F.2 describes the type of testimony this investigation is intended to support:

> Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor[.]

The Commentary to Guideline 10.11 expands upon the need for such testimony:

> Since an understanding of the client's extended, multigenerational history is often

> needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and, in any event, are almost always crucial to explain the significance of the observations. For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.

ABA Death Penalty Guideline 10.11 cmt. at 110 (footnotes omitted).

In *Williams*, this Court provided a similar rationale regarding the need for social history and expert psychological mitigating testimony. In that case, this Court found that Williams was denied effective assistance of counsel by his counsel's failure, among other things, to investigate his social history. *Williams*, 529 U.S. at 396. This Court found that even if the other available mitigating evidence may not have rebutted a finding of future dangerousness, the social and psychological evidence still might have prevented a jury finding that a death sentence was appropriate:

> [T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. *See Boyde v. California*, 494 U.S. 370, 387

> (1990). The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.

529 U.S. at 398. This Court found that Williams "had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Id.* at 393.

In *Wiggins*, this Court again found that defense counsel's investigation failed to meet constitutional standards when counsel failed to adequately investigate the defendant's social history. *Wiggins*, 71 U.S.L.W. at 4567. This Court found that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 4568. The failure of defense counsel to investigate in *Wiggins* was, as the Fifth Circuit found here, "the result of inattention, not reasoned strategic judgment." *Id.* at 4567.

3. Defense Counsel's Failure to Investigate and Prepare Mitigating Fact Witnesses

The record shows that Petitioner's trial counsel did not spend significant time investigating or interviewing mitigating fact witnesses, and in particular, failed to discuss with the Petitioner's parents the nature of the testimony that he wished to elicit from them about mitigating aspects of Petitioner's life. Tr. at 216-17, 224, 227. This lack of

investigation and preparation was found by the Fifth Circuit to be deficient performance. *Banks*, slip op. at 39.

ABA Death Penalty Guideline 10.11.F.1 addresses the importance of various kinds of mitigation testimony:

> Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death.

In addition, ABA Death Penalty Guideline 10.11.F.4 requires counsel to consider presenting "[w]itnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones."

The significance of fact witness mitigation testimony is very similar to the significance of psychological mitigation testimony, described previously. As the Court explained in *Williams*, testimony of this nature could cause the jury to decide not to impose a death sentence even if the testimony does not go directly to the issue of future dangerousness that is the question directly before the jurors. *Williams*, 529 U.S. at 398.

4. Defense Counsel's Failure to Interview Prosecution Witness Jefferson

ABA Death Penalty Guideline 10.11.I provides that "Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate,

misleading or not legally admissible." The Commentary to this Guideline elaborates upon this obligation:

> Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase. Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted or undercut.

ABA Death Penalty Guideline 10.11 cmt. at 113 (footnote omitted).

The record reflects that Petitioner's defense counsel did not interview prosecution Witness Jefferson, who was the only prosecution witness other than Witness Farr to testify for the prosecution at the penalty phase. Tr. at 167-168. Jefferson testified at trial that the Petitioner had been the aggressor in a fight they had shortly before the Petitioner was arrested, and that the Petitioner had threatened him. 10SR at 2493-94. In the federal *habeas* proceeding, however, Jefferson testified that *he himself* in fact had been the aggressor in the fight. Tr. at 166. Jefferson further stated that he would have been willing to talk to defense counsel prior to the trial, but that defense counsel never had attempted to interview him. *Id.* at 168.

The Fifth Circuit found that this failure to interview Jefferson also fell below an objective standard of reasonableness, but that the failure was not prejudicial to the Petitioner. *Banks*, slip op. at 41-43. Although the ABA takes no position on the Fifth Circuit's holding regarding

prejudice, counsel's failure to attempt to interview Jefferson is a clear violation of ABA Death Penalty Guideline 10.11.I that raises serious constitutional concerns.

CONCLUSION

The actions of both the prosecutors and defense counsel in this case departed from the standards and guidelines established by the ABA for prosecutors in all cases and for defense counsel in death penalty cases. The ABA respectfully urges this Court to consider these standards and guidelines and the bases underlying them in adjudicating Petitioner's claims of constitutional violations in this case.

Respectfully submitted,

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APPENDIX A

RELEVANT PROVISIONS FROM ABA STANDARDS

1. ABA Prosecution Standards

3-1.1 – The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

3-1.2 – The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

3-3.11 – Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

3-5.6 – Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

2. ***ABA Criminal Discovery Standards***

11-2.1 – Prosecutorial Disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, coping, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to

the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs,

buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and, insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial.

(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

11-4.1 – Timely Performance of Disclosure

(a) Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

(b) The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

*3. **ABA Death Penalty Guidelines***

10.7 – Investigation

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

10.11 – The Defense Case Concerning Penalty

A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2. Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;

5. Demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies,

artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses

associated with the government, defense counsel should:

1. carefully consider

   a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

   b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview ; and

3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

3.8 – Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence

about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.